January 31, 2007

Commission's Secretary
Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: Reply Comments on Request for Declaratory Rulings
WC Docket No. 06-210
CCB/CPD 96-20

To Whom It May Concern:

In response to the Federal Communications Commission (FCC) Public Notice, released November 22, 2006, relating to DA 06-2360, CCB/CPD 96-20, regarding the issuance of a Declaratory Ruling sought by One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc. and Winback & Conserve Program, Inc. ("Petitioner"), I hereby submit reply comments on behalf of myself and Combined Companies, Inc. (CCI), a company for which I was president and chief executive officer at all times relevant to the above captioned filings, in support of the FCC ruling in favor of Petitioner, and in direct response to AT&T's comments to the FCC to rule otherwise.

BACKGROUND

The FCC's notice was issued to resolve the issues under section 2.1.8 of AT&T's Tariff No. 2 as well as any other issues left open by the D.C. Circuit's Opinion in AT&T Corp. v. FCC, 394 F.3d 933 (D.C. Cir. 2005).

And, while AT&T has gone to great strides in its December 20, 2006, reply brief to the FCC to suggest that the FCC ONLY deal with the Declaratory Ruling request of Petitioner in the way AT&T sees it …. that is, to view the request of the Petitioner in the context of AT&T's version of the facts and IT'S INTERPERTATION of its own tariff(s), and as well, not even consider much of the Petitioner's requests that go beyond AT&T FCC Tariff No. 2, Section 2.1.8 … CCI and I remain confident that the FCC will step up to its responsibility as defined by Congress and be the arbitrator of these matters, as they involve issues of tariff interpretation that can (and MUST) ONLY BE DECIDED by the FCC.

This Declaratory Ruling request filed by Petitioners is based on a rather simple concept.

That concept is that, both Petitioner and AT&T each have obligations and responsibilities to each other under the plans to which CCI and Petitioner subscribed; and for which AT&T provided service. And, it is those obligations to each other that can no longer be addressed and resolved by the courts, as they no longer involve issues of fact, but rather, issues of tariff interpretation as to what the obligations to each were, and, as well did Petitioner as well as AT&T follow and honor its responsibilities to the other under the very tariffs that Petitioner now seeks the FCC review and rule. Additionally, while both

Petitioner and AT&T each have duties to the other, it must be determined that AT&T's duty is greater, as they wrote and "enforced" the tariffs (often through self help remedies, not allowed by the tariffs) controlled the requests and transfers made by Petitioners, imposed penalties unilaterally against Petitioner's end-user customers in violation of its tariffs, and continually ignored any and all Petitioners and CCI's requests and pleas to address its improper and illegal actions.

These actions must be reviewed by the FCC, and both CCI and I agree that the Petitioner has framed the Declaratory Ruling with issues that CAN and MUST be resolved by the
FCC in a timely and judicious manner.
In support of Petitioner's Declaratory Ruling, we have reviewed both AT&T's reply brief of December 20m 2006, and Petitioner's Reply brief, and now provide the following selective excepts from Petitioner that are consistent with our view and understanding of both CCI's and Petitioner's responsibilities and obligations under the tariff(s).

I The Permissibility and Infliction of Shortfall Charges Issue Is On the Table

1) AT&T asserts that the permissibility and infliction of shortfall issues are not before the FCC. AT&T is wrong. Petitioner's briefs to the District Court, as well

as previous filings by Petitioner and CCI to the FCC, covered over 100 pages of arguments relating to the shortfall issues.

2) AT&T knows full well that the shortfall issues got pulled into the District Court case because AT&T was claiming that it still had the availability to rely upon its fraudulent use section. Petitioners had to counter, explaining that the June 17th 1994 provision was 6 months prior to the Jan 1995 traffic only transfer. AT&T knew at the time of the traffic only transfer in Jan 1995 that petitioner's plans were immune from shortfall and termination infliction for a great time period, thus fraudulent use was a manufactured AT&T claim. By the time the two years were over the District Court had seen **an avalanche of paper** on shortfall issues from both sides.

3) That is why the District Court framed its referral stating **"other open issues".** If it was just the traffic transfer issue the Court would have said just that. There were so many other issues brought to the Courts attention that it was too long to mention them all so he simply stated all other open issues that were before the DC Circuit. Judge Bassler understood that the shortfall issues were clearly before the FCC. And, as importantly, Judge Bassler understood that ONLY the FCC could "interpret" the tariff that both Petitioner and AT&T were seeking to be bound.

4) In fact before FCC counsel Mr. Bourne could even complete its sentence regarding the grandfathered June 17th 1994 plans, the DC Circuit Judge Ginsburg completed the sentence for FCC counsel:

> FCC's MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this that the Commission didn't rule on. I mean, for instance --**
> JUDGE GINSBURG: **Whether they were grandfathered?**
> MR. BOURNE: **Right. So it could well be that there were little or no shortfall charges. The Commission didn't rule on that point, but if there were little or no --**
> JUDGE GINSBURG: If that was the understanding with which they went into this, then the nature of the scheme was to move the obligation to a customer who, away from a customer who would be able to shed its obligations under the grandfather provision, right? Or pardon me, if the Commission agreed that it was grandfathered under the old tariff. That's the scheme, to **move it from somebody who's got the benefit of grandfathering and can get out of its obligation that way to somebody who's got the benefit of a larger discount.**
> MR. BOURNE: **That's correct.**
> JUDGE GINSBURG: **Okay.**
> MR. BOURNE: There's another possibility is that if the transaction were to occur **mid-year,** for instance, and a carrier had **already met its minimum usage obligations**, then there wouldn't be any issue of -- now, I don't know the answer to that, but there --
> JUDGE GINSBURG: Okay, okay.
> MR. BOURNE: There's another possibility is that if the transaction were to occur **mid-year,** for instance, and a carrier had **already met its minimum usage obligations**, then there wouldn't be any issue of -- now, I don't know the answer to that, but there --
> JUDGE GINSBURG: Okay, okay.

5) Therefore it is quite obvious that there were **open issues** in the DC Circuit relating to AT&T's permissibility to inflict shortfall and termination charges on these plans, as well as the fact that the plans revenue commitment had already been met. Both of these were **open issues** at the DC Circuit.

6) The FCC counsel reiterated during the DC Circuit oral argument what the FCC stated in its Oct 2003 FCC Decision that the Commission **didn't rule on the pre June 17th issue; it was still an open issue.** The reason that the FCC did not rule on it in 2003 was that petitioners requested that the plans could forever be restructured. Petitioners have substantially modified its request for the FCC to act in accordance with the clear tariff language.

7) Additionally the FCC decision stated that it didn't rule on the shortfall issues because the District Court did not refer those issues to the FCC. Obviously the District Court did not refer the June 1996 shortfall issue because the **last** District Court decision (March of 1996), was 3 months before the June 1996 shortfall infliction; therefore there was not an open issue to refer in March of 1996.

8) When the shortfall hit in June of 1996 it was the FCC that notified AT&T and petitioners that these shortfall bills will be added to Declaratory Ruling requests.

During DC Circuit oral argument how was Judge Ginsburg able to complete the sentence of FCC Counsel Mr. Bourne?

> Mr. Bourne: there are **other aspects to this that the Commission didn't rule on. I mean, for instance --**
> JUDGE GINSBURG: **Whether they were grandfathered?**

9) Obviously Judge Ginsburg read the many pages in the joint appendix addressing the permissibility of shortfall, which both AT&T and petitioners asked the FCC to rule on these shortfall issues. Now that the facts have all been developed on shortfall, AT&T no longer wants the FCC to decide the shortfall issue. AT&T requested the shortfall be resolved in July 1996 and then AT&T further argued for in its 2003 public comments.

10) AT&T's argument in seeking to have the FCC not rule on the "illegal remedy" of the shortfall it imposed on CCI's end-users is again misleading the FCC. Extensive testimony and discovery was taken and briefing done **on the**

shortfall issue in the District Court in 1995 as the pre June 17th 1994 law was obviously 6 months prior to the traffic only transfer, so it was examined in depth by Judge Politan's District Court. The District Court Decisions both clearly cover the June 17th 1994 law on shortfalls. When AT&T illegally hit the plans with its unlawful shortfall, 190 bills were additionally added to the FCC's record.

FCC 2003 Decision Page 14 footnote 94:

> After receiving AT&T's bills for shortfall charges, 190 of CCI's end users sent letters to the Commission in June and early July of 1996. The Consumer Protection Branch of the Enforcement Division of the Common Carrier Bureau informed these end users that their letters would be treated as **informal comments in this declaratory ruling proceeding.**

11) Additionally, the FCC Decision clearly states that both parties addressed the June 1996 shortfall infliction issue in separate filings with the FCC that were added to the Declaratory Ruling proceedings. The FCC's 2003 Decision clearly shows that the dates of the FCC filings by AT&T and petitioners are **August 26, 1996**, and **September 23, 1996;** obviously after the **June 1996** shortfall infliction.

FCC 2003 Decision Page 4 para 7

> On July 15, 1996, the aggregators filed a petition with the Commission in which, "based on established Commission practice, policies, and precedents, the plain language of § 203 of the Communications Act of 1934, as amended, F.C.C. Rule 61.54(j), and Sections 201 and 202 of the Act," they sought declaratory rulings on four issues. **By separate cover motion**, the aggregators **also sought expedited consideration** of their petition for declaratory ruling because, they alleged, AT&T was **unlawfully billing certain charges to the aggregators' end-users**. AT&T filed Comments in Opposition on **August 26, 1996**, and Petitioners filed Reply **Comments on September 23, 1996.**

12) Many letters were sent to AT&T months before the June 1996 shortfall infliction advising AT&T that the plans were still pre June 17th 1994 grandfathered. Despite AT&T knowing the plans were immune AT&T continued its fraud by involving the end-users, illegally using the US Postal System to deliver what AT&T knew to be fraudulent bills.

13) The FCC noted….

> FCC 2003 Decision Page 14 Footnote 94
> Accordingly, we surmise that AT&T made no further attempt to bill or collect these charges from CCI's end-users and therefore conclude that the propriety of imposing shortfall charges on CCI's end-users is a moot issue.

The propriety that the FCC addresses in Footnote 94 must be evaluated from not only the traffic only transfer stand point but must now be evaluated from the June 1996 shortfall infliction stand point. See Petitioner's Exhibit NN, a sample AT&T bill of an end-user in June 1996. The June 1996 infliction was not permissible plus **it was done in an illegal fashion** (emphasis added).

14) Putting charges on the end-users bills whereby a $300 user gets a bill for about $4,000 was analogous to 4,000 bullets to the chest; petitioners were dead! AT&T bogusly blamed the petitioners and all petitioner goodwill was lost. AT&T immediately stopped all payments to petitioners and effectively ended the business overnight. Pulling the charges off the bill was like pulling the 4,000 bullets out of the dead body. A Judge will go no softer on the shooter because they buried the victim without the bullets nor should the FCC. Therefore, the FCC must evaluate the permissibility and illegal method of applying the June

1996 shortfall charges, as AT&T's conduct as allowed under its tariffs is most certainly something a court COULD NOT and SHOULD NOT arbitrate.

15) The bottom line is AT&T wanted the FCC **"to issue a ruling"** on shortfall and stated **there were no disputed facts**. Both parties additionally briefed the FCC on the shortfall charges. In 1996 and 2003 AT&T **encouraged the FCC to rule on the pre June 17th 1994 shortfall issue**; how in the world does AT&T now state in 2007, not to rule when AT&T has already taken the position to the FCC (1996 & 2003) and to Judge Bassler in 2006 that there were no disputed facts?

Furthermore, AT&T also offers no disputed facts, because there aren't any.

16) This time around the FCC has AT&T admitting the plans were still classified as pre June 17th 1994 issued at the time of the traffic only transfer, the July 3rd 1996 Charles Fash letter (exhibit BB in petitioners initial filing [1]) confirms that the plans had not been restructured, and the FCC has its own Oct 1995 Order, which was not presented in 2003 by petitioners. Petitioners found that order by doing a google search on "AT&T Grandfathers" and found it. Why mention this? Because in the FCC 1995 Order it states that AT&T was suppose

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[1] AT&T's Charles Fash July 3rd 1996:

Indeed the relevant period for calculation of the shortfall charges in issue did not expire until **March 31st 1996**, and the charges were then billed on the June 1, 1996 bills. AT&T's claim for payment of these charges obviously could not have been the subject of litigation until both of these events had occurred.
Petitioners were significantly involved in the June 17th 1994 ruling as a protestor along with many other aggregators. Petitioners deliberately restructured all its CSTPII plans to have fiscal year dates starting just prior to June 1994 to maximize what it believed, at the time, to be at least three years shortfall and termination immunity or for the life of the RVPP ID as per AT&T staff.

to send the notification of the FCC Order "receipt requested" to each aggregator in 1995 and of course AT&T never did.

17) AT&T knows it violated the tariff by inflicting shortfall charges against petitioners. That is why it is arguing now, so vehemently not to decide the issue. Why is it that AT&T is not interested in pursuing its 1997 counter claim on the 1996 shortfall issue? Because AT&T is most certainly aware that it can not escape from its conduct; and that any review by the FCC of the manner in which they "inflicted shortfall penalties" against CCI's end-user customers was ILLEGAL and in clear violation of its tariffs.

18) The FCC did not have the following in 2003:

AT&T's May 22nd 2006 brief to the District Court stated that all the issues were already before the FCC. The reason why AT&T was telling the truth to the District Court was because AT&T did not want the stay lifted; but now that AT&T is before the FCC AT&T again changes its position. Petitioners have seen AT&T do the same maneuver to each venue. When before the Court argue that all the issues are interpretative and must go to the FCC. When before the FCC, argue that all the same exact issues are all disputed facts. The FCC and the Courts have allowed AT&T to pull this nonsense off for 12 years.

19) Here is AT&T's position to the District Court:

> Plaintiffs made the same arguments to the FCC that they are now raising in this Court. Their **prior submissions to the agency** confirm that the issues they ask this Court to decide **are all encompassed within this Court's primary jurisdictional referral.**

Now that we are before the FCC, no longer is this AT&T's position.

The FCC did not have this in 2003 either:

AT&T's position before the District Court was that all issues were interpretive and that there no disputed facts. AT&T counsel Mr. Guerra argued to the District Court:

> Mr. Guerra: First of all, firstly, everything counsel said was in fact a question of **interpretation.** District Court Transcript pg. 20 line 9.

20) There are no disputed facts on the shortfall issues. Petitioners' worst case scenario shows that even if the FCC decides that petitioners were only entitled to restructure one time under the pre June 17th 1994 rules, and then uses the FCC Oct 1995 Order, and 1st year credits rule, there is no shortfall possibility until way past June of 1996. AT&T was therefore in violation in June 1996, and AT&T's fraudulent use nonsense in Jan 1995 was merit less even if it met the 15 day statute of limitations—which it didn't.

21) Regarding the illegal remedy issue what additional fact finding can the District Court possibly come up with as it is crystal clear, based upon the 190 end-users bills that the FCC already has which shows AT&T violated its tariff. The bills all show shortfall charges inflicted well above the tariff allowed remedy of only permitting AT&T to reduce the discount. The non disputed facts are the bills and the tariff law is at 3.3.1.Q bullet 10. The FCC must rule that this is an illegal remedy.

22) AT&T is constrained by its tariff and it simply inflicted the bogus shortfall to blame petitioners and bring the accounts back to AT&T.

Clearly AT&T acted outside of its tariff:

FCC 2003 Decision Page 12 para 17:

> Thus, the "filed tariff doctrine" requires carriers, as well as their customers, to abide by the terms of the tariff **and precludes carriers from acting outside it**

Given the fact that AT&T did not adhere to its restructure (Discontinuance without Liability) June 17th 1994 grandfather provision and used an illegal remedy[2] in assessing shortfall it is clear that there is no additional fact-finding on these issues necessary, as the FCC sated itself:

FCC 2003 Decision Page 13 Footnote 87

> **Given our conclusion that AT&T violated section 203 of the Act, it is unclear what additional fact-finding on these issues is necessary.**

That's Right!!!

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[2] FCC 2003 Decision Page 13 para 19
Subsection 203(c) forbids a carrier from employing or enforcing any classifications, regulations, or practices affecting its charges unless they are "specified" in the tariff and makes it unlawful for a carrier to deviate, in the rendition of tariffed services, from the charges, regulations, and practices set out in its filed tariff. [FCC Footnote 91] **We agree that, when AT&T availed itself of a remedy not "specified" under its tariff, it violated section 203 of the Act.** [FCC FOOTNOTE 92]
FOOTNOTE 91:
47 U.S.C. § 203(c); *see Central Office Telephone*, 524 U.S. 214
FOOTNOTE 92
47 U.S.C. § 203(c).

23) AT&T would like shortfall issues to simply go away, but this time the FCC must address these issues that affect both the traffic transfer issue and the June 1996 issue.

The FCC's adjudication of shortfall permissibility issue is self defined as it relates to June 1996 infliction.

24) FCC 2003 decision at Page 11 para 15 & Page 14 para 20

> The Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to "terminate a controversy or remove uncertainty.

AT&T acknowledges that in its own reply brief of December 20, 2006, ironically in support of its reason why the FCC should not rule on this issue.

II The Record Is Loaded With Evidence Clearly Showing that the Transferors Revenue Commitments and its Potential for Shortfall and Termination Stay With the Transferor's Plan

25) Here are many cites from the record, (there are dozens more), from AT&T when AT&T was focused on denying the fact that 2.1.8 allowed traffic only transfers.[3]

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[3] District Court Judge Politan March 1996 Decision page 5 para. 1
Additionally, AT&T contested plaintiffs' allegation that any tariff transmittal determined by the FCC could only have prospective effect --**contending that the tariffs in question had never permitted fractionalization of plans and service** and that the outcome of the Tariff Transmittal No. 9229 would establish that conclusion without question.

District Court Judge Politan March 1996 Decision page 6 Last line.
As such, regardless of the intent, if any, of AT&T's post-May 19, 1995 conduct, the Court must now revisit its earlier determination and consider whether interim relief may be granted pending a resolution by the FCC of **the question whether service and plans may be fractionalized by aggregators.**

AT&T did not realize at the time that the focus of the case would eventually be on which obligations transferred on a traffic only transfers:

District Court's 1995 non vacated Decision on page 4 footnote 4; originally page 58 of Joint Appendix to the DC Circuit. HERE AS Petitioner EXHIBIT: **Reply A**:

> *Any* bad debt or unpaid bills created by an aggregator's end users will be deducted from **that aggregator's RVPP** discount return by AT&T before remission of the CSTP II/RVPP return.

26) The District Court's 1995 non vacated Decision on page 5 footnote 5; originally page 59 of Joint Appendix to the DC Circuit. HERE AS Petitioner EXHIBIT: **Reply A:**

> as in the plaintiffs' case**, AT&T deducts from the RVPP discount**/rebate remitted to PSE any bad debt or unpaid bills accrued by its end users.

In the above cites, Judge Politan's decision was correct that the bad debt is deducted from the aggregator RVPP pool that had the accounts on its plan. AT&T's ridiculous theory states that all obligations must transfer on a "traffic only" transfer and therefore the transferee would be responsible for bad debt on the accounts **that did not get transferred** from a transferor! AT&T's bogus theory of how 2.1.8 operates in the marketplace would make PSE responsible for bad debt on end-user accounts that it never received from CCI! Imagine AT&T

Also see Exhibit I in petitioners initial filing which is a fax from AT&T processing manager Joyce Suek that advised petitioner that AT&T no longer did **partial** TSA's; i.e. traffic only transfers, it had to be for all the traffic and entire plan. Notice there was no option to transfer the revenue commitment and hence S&T obligations and have CCI/Inga keep the plan. Therefore when the DC Circuit understood that 2.1.8 allowed traffic only transfers the obligations question was by default answered.

actually thinking that this theory is the way its tariff works in the business marketplace!

27) The District Court's 1995 non vacated Decision on page 5 para 2; originally page 59 of Joint Appendix to the DC Circuit. HERE AS Petitioner EXHIBIT: **Reply A:**

> As customers of record, the aggregators are lawfully responsible for any deficiency in usage. Thus they aggregate **their commitment** out to small business which need that service but cannot obtain the best deal directly with the common carrier because of their low volume of service usage**. If the end users fail to pay their bills or if there is any shortfall in usage under an aggregator's plan, "that aggregator" is liable to AT&T for the deficiency**. For instance, under the CSTP II agreements, the discount rates available to plaintiffs are contingent upon high annual usage commitments. If such commitments are not met, **the aggregator is obligated to pay "shortfall" charges**, which amount to the deficiency in usage over the contract term. Shortfall charges are retroactively imposed. If a plan is prematurely terminated, **the aggregator is liable for a prospective "termination" charge** for the prospective deficiency under the agreement.

In the above cite the District Court clearly recognized that the aggregator is responsible for its plans commitments. If the plan does not transfer the plan commitment can not transfer.

28) District Court's 1995 non vacated Decision on page 9 para 2; originally page 64 of Joint Appendix to the DC Circuit. HERE AS Petitioner EXHIBIT: **Reply A:**

> Moreover, plaintiffs allege that AT&T has further violated the Act by failing to comply with the plain terms of its own tariff, **namely section 2.1.8,** which makes no reference to any deposit requirement and contains no cross-reference to that section of the tariff which allows deposit demands, namely section 2.5.8. Additionally, plaintiffs allege that AT&T's danger of losing on the Inga companies' commitments **was less after the Inga companies/CCI transfer than before.** For instance, plaintiffs point out that under the **tariff rule of transfer**: (i) AT&T had security in the fact that it. AT&T, bills the end users directly; (ii) AT&T

> could pursue CCI for the going-forward non-payments arising from the transferred plans, while having recourse to the Inga' companies for all pre-transfer non-payments; and [iii] that **AT&T could look to CCI and/or the Inga companies for shortfalls in the minimum annual commitment levels under the plans.**

Above the District Court expressly states that it is using **section 2.1.8 to determine allocation of obligations.** The fact that the decision states that both CCI as well as the Inga Companies would remain liable for shortfalls on its plans indicates the Court understood the joint and several liability provision of section 2.1.8., as CCI would be primarily obligated for the **actual shortfall obligations** but AT&T still would be able to pursue the Inga Companies for shortfall as well, since the Inga Companies **remained jointly and severally obligated** for shortfall that did not transfer. The FCC accurately referenced this decision that used 2.1.8 in its 2003 FCC Decision to counter AT&T's bogus fraudulent use claims.

29) The District Court's 1995 non vacated Decision on page 10 para 2; originally page 65 of Joint Appendix to the DC Circuit. HERE AS EXHIBIT: **Reply A:**

> On January 13, 1995, PSE and CCI jointly executed and submitted written orders to AT&T to transfer the 800 traffic under the plans CCI had obtained from the Inga companies to the credit of PSE. Only the traffic was to be transferred, not the plans themselves. In this way, **CCI would maintain control over the plans** while at the same time benefiting from the much larger discounts enjoyed by PSE under KT-516. AT&T refused to accept this second transfer on the ground that CCI was not the customer of record on the plans at issue, and thus could not transfer the traffic under those plans to PSE. **AT&T was further troubled** by the fact that if **only the traffic on the plans and not the plans themselves were transferred to PSE**, the liability for **shortfall and termination charges**

> **attendant thereto would then be vested in CCI**: an empty shell in AT&T's view.

The above cite again confirms that CCI would maintain control of the plan and the shortfall and termination obligations attendant thereto would continue to be vested in CCI after the traffic transfer to PSE. Judge Politan was accurately recounting AT&T's position as he states: "AT&T was further troubled." AT&T is judicially estopped from changing its position.

30) AT&T's 1996 brief to the FCC page 7 footnote 6

> AT&T Transmittal No. 8179 **would have** made explicit that an existing customer could not transfer even "substantially all 800 numbers on an existing plan" under circumstances where it would not be able to meet volume commitments unless the new customer agreed to assume "**all of the existing customer's obligations"**.

In the above statement AT&T is admitting that all the obligations which here are referring to shortfall and termination obligations would transfer because a **PLAN** transfer would occur under 8179 not a traffic only transfer. Tr.8179 was rejected by the FCC so the status quo remained that S&T obligations do not transfer on traffic only transfers.

31) AT&T's 1996 brief to the FCC page 7 footnote 6:

> Under the terms of CCI's requested transfer, CCI would have remained the customer of record for the CSTPII Plans; but by transferring its revenue-producing accounts, CCI could render itself an asset less shell, unable to either fulfill **its revenue commitments** to AT&T **or pay its shortfall or termination charges.**

AT&T is again confirming that under the tariff the revenue commitment and its associated S&T obligations stay with the customer's plan. The shortfall and termination obligations change all the time as it is **the difference between the**

revenue commitment and the account traffic that was left on the CSTPII plans. When AT&T states it wants shortfall and terminations obligations transferred that in a misnomer. What AT&T is really saying is that wants the transferor's (CCI/Inga) revenue commitment to transfer with all the traffic as per Tr. 8179. What AT&T is essentially saying is that it wanted the transferor to do a **plan transfer**; not to do a traffic only transfer. The DC Circuit said 2.1.8 allows both traffic only transfers and plan transfers.[4] AT&T's ability to collect shortfall and termination liability from a transferor may occur on a "**non"** pre June 17th 1994 grandfathered plan would still be available for AT&T to pursue as to the CSTPII transferors' plan. Since AT&T is not allowed to charge aggregators end-users shortfall charges, AT&T's argument can not be that AT&T needs to have the accounts on the transferors CSTPII plan.

32) To follow is AT&T's position that the only way that AT&T was allowing a "traffic only" transfer is that the transferor (CCI/Inga) would have to transfer the plan; thus basically stating that 2.1.8 does not allow traffic only transfers:

AT&T REPLY brief to the Third Circuit in 1996: Page 2 paragraph 2:

> The overriding fact is that plaintiffs had a clear right under AT&T's tariffs to transfer all the customer locations on the CCI/Inga plans to PSE if they also transferred all the obligations under the **plans** to PSE. And AT&T could not and would not have had any objection to the CCI-PSE transaction if it had been structured in this way. **Following such a transfer**, PSE would have had the right to discontinue service **under the plans** and to put all the traffic on Contract Tariff 516

[4] AT&T's position is basically the same that Judge Roberts stated was nonsensical.

In the above statement AT&T says PSE would get CCI/Inga plans and then AT&T would allow the traffic to transfer; but that's not a traffic only transfer between two different AT&T customers! Also AT&T is again saying that all the obligations (including S&T obligations) would transfer only on a plan transfer. The DC Circuit found this to be nonsense.

Here is another that shows the allocation of obligations:

33) District Court March 1996 Decision page 17 para 1. Here as Exhibit Reply B.

> Thirdly, AT&T has little or no danger of being harmed should the sought-for relief be granted. Its economic risk, if any, would arguably be covered by an anticipated excess over commitment under Contract No. 516, **[FOOTNOTED HERE]** and/or by its increase in revenue by dint of acquiring plaintiffs' customers as they are siphoned into Contract No. 516 by alternative avenues. Indeed the Court notes that the services provided by AT&T are billed directly to the end user who in turn remits payment directly to AT&T. The instant injunction does not change that, nor does it increase the risk that the end user shall not pay. Other interested parties --among them, end users themselves --face no threat of harm should the relief sought be granted
> **[FOOTNOTE FROM ABOVE]**
> As previously referenced, **AT&T's counsel represented** that AT&T has initiated suit against PSE for shortfalls. In analyzing the instant motion, however, and in light of the fact that that suit was for the first time referenced orally at the hearing on this motion, the Court is not deterred by such litigation. **Indeed, AT&T's own counsel focused the issue by indicating that the tariffed obligations involved herein "are all tariffed obligations, for which "CCI, not PSE" would be obligated.**

AT&T was trying to get out of the case by stating that PSE was having shortfall problems on its own CT-516. In the above quote it is important that AT&T's own counsel stated that **PSE would not be obligated for CCI's S&T obligations, because CCI maintains the plans commitments.**

JUDGE ROBERTS: So your reading is that the whole plan may be transferred provided that the whole plan is transferred, right? I mean, it's kind of a nonsensical reading, isn't it?

34) AT&T brief in 1996 to Third Circuit page 8:

> Under this second proposed transfer, "**PSE would not assume" Inga's and CCI's shortfall or termination liabilities.** As the District Court noted, "[only the traffic was to be transferred, not the plans themselves" with all of the **plans' concomitant obligations**. Id. at 10 (AA 1037).

The above cite again shows that AT&T in 1996, before AT&T knew that it needed to change its post FCC Decision con on obligations actually explained how 2.1.8 worked.

35) AT&T counsel Fred Whitmere's letter of February 6th 1995.

> Mr. Inga's efforts to transfer these end users and **leave the plans intact with their commitments**, …..AT&T will seek to enforce its rights **in the event shortfall and termination charges** become due under the tariff and will hold Mr. Inga personally liable for his conduct intended to deprive AT&T of its tariff charges. (See Exhibit X to petitioner's initial filing)

The above is another accurate statement on obligations allocation before AT&T's necessity to confuse and mislead everyone on allocation of 2.1.8's obligations.

36) AT&T brief in 1996 to Third Circuit page 9 para 1:

> As the District Court put it in its initial order in this case, "[w]ithout the revenue generated by the traffic under the plans, CCI would have no income and no means of backing **the responsibilities it maintained after the CCI/PSE transfer**." 1995 Order at 10

37) AT&T brief in 1996 to Third Circuit Page 10 Para 3:

> purpose and the effect of "avoid[ing] the payment, in whole or in part, of tariff" charges": i.e., shortfall and termination charges that would "likely accrue" on the **nine plans.** The proposed transfer would have transferred the entire revenue stream from the traffic on the plans without **also transferring the corresponding obligations to pay shortfall and termination charges**. See Meade 2d Supp. Cert. ¶ 6 (AA 1266).

38) AT&T brief in 1996 to Third Circuit Page 12 footnote 5:

> FCC Tariff Transmittal 8179 would have made explicit that an existing customer could not transfer even "substantially all 800 numbers on an **existing plan"** under circumstances **where it would not be able to meet volume or term commitments unless the new customer agreed to assume all of the existing customer's obligations**. See Meade 2d Supp. Cert. ¶ 7 (AA 1267).
> That tariff transmittal would have foreclosed any request for injunctive relief in this case if it had taken effect by its terms, and would have raised issues similar to those presented by plaintiffs' complaint if it had taken effect prospectively. As noted below, however, AT&T, at the FCC's request, thereafter withdrew the transmittal and substituted a new transmittal which would "achieve AT&T's specific purpose" in a different way. Id. ¶¶ 10-16 (AA 1268-70).

In the above statement AT&T is admitting the tariff is not explicit and therefore AT&T losses anyway. However, refusing to face the fact that it gets caught in its "tangled web of deceit" AT&T continues to try and persuade that it was implicit that 2.1.8 allowed AT&T to mandate that a plan transfer when there was an order for a substantial percentage of the accounts transferred.[5]

39) The following quote is important because AT&T associates the transaction ***proposed*** to AT&T **with AT&T's tariff.** AT&T had some nonsense in its Dec 20th 2006 brief that stated that all the concessions that its counsels made about S&T obligations staying on the CSTPII plans were based upon petitioner's *proposal.* AT&T was bogusly telling the FCC that the attempted traffic only transfer was just a *"proposal"* and the FCC and AT&T's counsel were not evaluating it based upon the tariff. Below we see AT&T taking the position that its tariff also

[5] It has never been AT&T's position that petitioners simply moved too many accounts. AT&T simply stated that 2.1.8 did not allow the traffic only transfer. AT&T never came back to petitioners and said it will allow a certain percentage. There was no negotiation. Petitioners never had the opportunity to say:"Ok how much is too much?" Nor should they have had to. AT&T just refused it.

acknowledged that S&T obligations (revenue volume commitments) stay with transferor (CCI/Inga):

AT&T brief in 1996 to Third Circuit Page 29 line 3

> Therefore, **AT&T's tariff provisions** must, under settled rules of equity, be read to permit AT&T not to render performance (i.e**., transfer the traffic**) before receiving adequate security that **plaintiffs** will themselves render their **required performance (i.e., fulfill their volume commitments and pay all required shortfall charges).**

40) The S&T commitment stays with transferor:

AT&T's brief in 1996 to Third Circuit Page 28 para 1:

> As an AT&T employee testified, under CCI's requested location transfer, CCI would have nominally remained the customer of record for the CSTP II's. But by transferring its revenue-producing accounts, **CCI** would apparently have rendered itself an asset less shell, unable either to fulfill **its** commitment or to pay **its** shortfall or termination charges.

As we see above in **1996** [prior to the 2003 FCC decision when AT&T had to change its obligations position], AT&T clearly identified the obligation allocation, because the AT&T scam back then was on "how the traffic could transfer", not which obligations transfer.

III. AT&T Tries to Repair the Avalanche of Evidence Against It

41) Obviously the record is absolutely loaded with concessions from many AT&T's counsels stating that the revenue commitments and shortfall and termination obligations remain with the non-transferred CCI/Inga plans. Why did AT&T's counsel give away the answers that favor petitioners? Because the issue of which obligations transfer on traffic only transfers was not the initial

focus; the initial focus was whether 2.1.8 allowed traffic only transfers. Therefore AT&T didn't know back then (prior to the FCC 2003 Decision) that it was **inadvertently hanging itself** on the obligations allocation question.

42) The question referred that Judge Politan initially referred was:

> whether section 2.1.8 [of AT&T's Tariff FCC No. 2] permits an aggregator to **transfer traffic under a [tariffed] plan without transferring the plan** itself in the same transaction.

The focus was on the methodology of account movement, not on allocation of obligations. What happened was that AT&T's counsels in an attempt to argue whether the tariff permits an aggregator to "transfer traffic under a [tariffed] plan without transferring the plan" **spilled the beans!**

43) Additionally, AT&T's fraudulent use defense also put AT&T in a real bind because the only way to argue that it was going to be deprived of the potential of S&T liabilities on CCI/Inga's plans was to obviously admit that S&T obligations do not transfer on traffic only transfers.

Faced with dozens of AT&T concessions AT&T makes a feeble attempt to cover-up for all of its counsel's concessions.

AT&T in an attempt to clean up its counsel's concessions also asserts on page 29 line 3:

> Moreover, as AT&T has explained, a valid or permissible traffic transfer under § 2.1.8 would not have extinguished the transferor's liabilities; rather, the **joint and several liability requirement** meant that both the transferor and transferee were responsible for the transferor's obligations. **Accordingly, any AT&T statement that a transferor remained liable for such obligations** after the transfer was in no sense a "concession" that shortfall and termination obligations did not transfer.

44) There are **major holes** in AT&T's attempt to simultaneously repair **all** counsel's concessions. (A) The quotes were made when AT&T was simultaneously arguing that the transferor (CCI) was not jointly and severally liable as petitioners have evidenced at exhibit Z to petitioner's initial filing and the quote is here at paragraph 95 above. CCI maintained the actual obligations. Joint and several liability can only occur on plan transfers as per 2.1.8E Petition Exhibit AA.

(B) AT&T claims that all its counsels were referring to joint and several liability obligations remaining with transferors plan not the actual controllable S&T obligations. The major problem with this "cover up" is that when AT&T argues that the transferor (CCI) would have joint and several liability for S&T obligations that **by definition would mean that CCI transferred the actual S&T obligations to PSE!!!** However, the non disputed fact is that AT&T has always maintained that CCI did **not** transfer the actual shortfall and termination obligations, therefore **AT&T's own cover defense conflicts with its position!!!** If all counsels were "**really stating"** that CCI's remaining obligations were "only joint and several liability" then Counsels would have had to recognize that the actual obligations transferred to PSE, and why then didn't AT&T transfer the traffic? According to AT&T there were no other reasons not to!

(C) This is a brand new defense for AT&T. AT&T's statement "as AT&T has explained" gives the illusion that this was AT&T's position from day one. AT&T

simply fabricated its bogus 8 different counsel "global cover-up" on the fly and simply never thought the con job through.

45) AT&T's feeble attempt to cover for its many counsel's concessions by stating that what its counsels were referring to as obligations remaining on CCI's plans were "joint and several liability obligations" conclusively defeats itself. There is absolutely no way to interpret many different AT&T counsel's concessions other than for what they are; **many concessions that the transferors plans actual (not joint and several liability) revenue commitments and the plans associated shortfall and termination obligations simply do not transfer on partial traffic only transfers under section 2.1.8!**

Mr. Whitmeres' clear statement was made before the obligations issue was the focus:

> Mr. Inga's efforts to transfer these end users and leave the plans intact with their commitments, …..AT&T will seek to enforce its rights in the event shortfall and termination charges become due under the tariff and will hold Mr. Inga personally liable for his conduct intended to deprive AT&T of its tariff charges. (See Exhibit X to petitioner's initial filing)

46) AT&T's cover up "all of its counsels" quotes were referring to joint and several liability remaining with CCI don't even make sense as the quotes were not addressing joint and several liability. They were quotes explaining what all obligations meant.

Mr. Carpenter's statements to the D.C. Circuit confirm that he fully understood the tariff when he was directly asked by Judge Roberts what "all obligations"

meant. Mr. Carpenter correctly explained what "all obligations" meant varied, depending upon what's transferred.

> Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.
> Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred.

David Carpenter supporting petitioners during Third Circuit Oral Argument:

> We point out in our brief that there's a distinction between transfers of entire plans, and transfers of individual end-users locations. That when the "**plan"** is transferred, **"all the obligations"** have to go along with it. (exhibit V in petitioners filing Pg 15 line 9)

See Carpenter again at exhibit V. in petitioners filing Pg 15 line 23…

> When you're transferring **all** the traffic, you're transferring the **plan**. That is –and the obligations have to go with it, shortfall and termination liability. (emphasis added)

47) AT&T Counsel Friedman Concession: Mr. Friedman's statement points to 3.3.1.Q regarding responsibilities.

> As AT&T's customers-of-record, Petitioners were responsible for the tariffed shortfall and termination charges. Section 3.3.1.Q of AT&T FCC No 2 See also AT&T Further Comments filed April 2nd 2003 ("AT&T's Further Comments 2003") at 7-8.

AT&T asserts that Mr. Friedman was actually referring to joint and several liability obligations remaining with CCI/Inga, however Mr. Friedman was the author of AT&T's brief to the FCC in 2003 stating that CCI had **no** joint and several liability obligations. It was obviously Mr. Friedman's position and concession that led the FCC to correctly interpret that S&T obligations do not transfer under 2.1.8.

48) AT&T asserts on page 28 para 3:

> Petitioners also quote various statements by AT&T and its lawyers in a vain effort to prove that AT&T has repeatedly conceded away the merits of a dispute it has been litigating with petitioners for over a decade. Petitioners cite a series of statements by AT&T lawyers that **simply described the transfer petitioners "*proposed*."**

AT&T's statement makes absolutely no sense. The FCC and DC Circuit were both asked to interpret the transaction as attempted by petitioners under AT&T's tariff. Because AT&T denied the transaction all parties rendered their interpretation of the tariff as to the attempted traffic only transfer. Each AT&T counsel was perfectly clear regarding which obligations transfer. Here is the tie in to the tariff:

AT&T brief in 1996 to Third Circuit Page 29 line 3

> Therefore, **AT&T's tariff provisions** must, under settled rules of equity, be read to permit AT&T not to render performance (i.e**., transfer the traffic**) before receiving **adequate security** that **plaintiffs** will themselves render their **required performance (i.e., fulfill their volume commitments and pay all required shortfall charges).**

49) AT&T stated above that it wanted adequate security on a traffic only transfer and ended up enhancing security within 2.1.8 in May of 1996 when it added additional deposits. Where do you think the deposit requirement landed? Yes, on the transferors plan because the transferor obviously maintained the revenue commitments and the transferors associated S&T obligations on its non transferred plan.

50) AT&T again asserts on page 29 para 1:

> Petitioners also quote statements AT&T's counsel made during oral argument to the D.C. Circuit. Petn. at 18-19. But in the passage they quote, Mr. Carpenter simply recognized that truly de minimis traffic transfers fell outside the scope of § 2.1.8 altogether. See Exh. W (AT&T "would not take the position, then, that any shortfall obligation went with the transfer of a single number"). **One page earlier,** in a passage petitioners omit, Mr. Carpenter indicated **that a single number** could have had an outstanding indebtedness that would transfer. See Exh. 9. It was only in the limited context of **de minimis transfers,** then, that counsel suggested that the obligations that transferred might "vary depending on what's transferred." Id. Nowhere, however, did counsel concede that the phrase "all obligations" did not include shortfall and termination obligations, or that these latter obligations might not transfer when virtually all traffic was transferred.

Simply evaluate Mr. Carpenter's statements:

> Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.
>
> Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred

51) Mr. Carpenter was answering the question posed directly to him by Judge Roberts at that time! AT&T admits that it pieced together answers to questions from different pages to create this amazing defense. The statements that Carpenter made about being allowed to only transfer indebtedness (so called **de minimis transfers,)** were made to Judge Tatel who also did not believe a word he was saying because Judge Tatel stated that all obligations transferred only on a plan transfer. Petitioners want to know where in the tariff is the **de minimis transfer section.** There is no such thing! Under the Filed Tariff Doctrine AT&T is not allowed to go outside its tariff.

52) AT&T actually justifies what Mr. Carpenter says on page 12 of the oral argument because of total nonsense he said on page 11. However, before Mr. Carpenters comments in **2004,** Mr. Carpenter told the Third Circuit in **1996:**

> We point out in our brief that there's a distinction between transfers of entire plans, and transfers of individual end-users locations. That when the "**plan"** is transferred, **"all the obligations"** have to go along with it. (exhibit V in petitioners filing Pg 15 line 9)

53) Was Mr. Carpenter talking about de minimis transfers in 1996 too? Since 1996 comes seven years before 2004 petitioners believe AT&T's "what he said earlier" theory is a little suspect! Mr. Carpenter clearly understood that all the obligations transfer on only the accounts that were transferred. This nonsense about Mr. Carpenter was talking about a transaction that doesn't even exist in the tariff would be comical if petitioners weren't waiting 12 years for justice.

IV. PSE Does Not Assume Revenue Commitments And Associated S&T Obligations on A Traffic Only Transfer

54) AT&T on page 33 the 5th line from bottom:

> if the risk of actually incurring shortfall charges were really slim to none, why did PSE so adamantly refuse to accept the obligation? If petitioners had truly believed the assurances they now provide to the Commission, they could have simply **amended their transfer forms** so that PSE accepted all of CCI's obligations, including its minimum revenue commitments and associated shortfall penalties. Their failure to do so-and their willingness to litigate the issue for over a decade-makes clear that there were economic risks associated with the obligations that PSE was unwilling to assume.

The reality is that PSE actually wanted the CCI/Inga plan but petitioners would not give up its grandfathered plan. Additionally, if PSE assumed CCI's revenue commitment it wouldn't be a traffic only transfer it would be a plan transfer and

petitioners would lose its status as AT&T Customers of Record. If the plan was transferred to PSE then CCI would no longer be AT&T's customers of record. AT&T's 2.1.8 version detailed such: **See PETITIONER EXHIBIT C**

> **D.** The Current Customer will no longer be AT&T's Customer for the service as of the Effective Date of the transfer.

55) Petitioners wanted its own contract and AT&T would have required under its tariff, $13.5 million dollars in security deposit on a new plan. Therefore the plan needed to be kept to continue being an AT&T customer and prohibit AT&T from demanding deposits on plans that were immune from shortfall anyway.

56) Additionally, under the Filed Tariff Doctrine a customer can not **amend its form** to participate in a transaction that the tariff does not allow. An AT&T customer can not keep its plan and transfer partial traffic and also transfer its revenue commitment and corresponding S&T obligations, leaving the plan behind with the remaining accounts; that's why when AT&T's attempted Tr. 8179, the change does not show such an option, because it does not exist. For AT&T to now state that it would allow a customer to alter the tariff is absurd. Petitioners knew that such a transaction never did, and never could take place.

57) AT&T's nonsense that PSE refused anything is a farce. PSE was never presented with plan obligations to assume, because it was **not** assuming the plan. CCI/Inga wanted to keep its plan with the obligations. PSE did exactly what it was suppose to do as Judge Politan stated; sign the form. AT&T is acting as if PSE wrote in its submission, "PSE will not accept any obligations!" PSE's cover letter states it is doing a "proper" submission as it had been doing all along

allowing other CSTPII/RVPP 28% aggregators to transfer traffic only to PSE's 66% CT-516 plan. The FCC should see on page 4 of Exhibit F to petitioners initial filing PSE states:

> Please find a **properly executed** AT&T transfer of Service Agreement (TSA) to move all of the end-user locations, except the 181 account number and the 131 lead number into PSE's CT516. (CSTP/RVPP Plan ID #003690)

58) The fact is petitioners wanted to keep its grandfathered "golden goose" plans with its S&T obligations that it was immune from. **The fact that petitioners wanted to keep its obligations speaks much more of its understanding that the plans were immune from S&T obligations than AT&T's fabrication that PSE did not want the plans.** Petitioners wanted its own CT plan and were negotiating with AT&T for one that would offer more to the end-user than what PSE was offering. Petitioners wanted to safe guard its accounts on PSE's plan temporarily then take them back when it got its own contract tariff that AT&T denied.

V. AT&T Erroneously States that the FCC Did Not Use 2.1.8 to Determine Which Obligations Transfer on Traffic transfers

59) AT&T on page 2 tries to get the FCC to believe that petitioners were contradicting it self. AT&T pg.2 para 2 states:

> They argue, for example, that the Commission has already ruled that the phrase "all obligations" does not include the obligations to pay shortfall

> and termination charges. But, because it deemed § 2.1.8 wholly inapplicable to traffic transfers, the Commission did not determine-and indeed, could not have determined-what the phrase "all obligations" meant. Flatly contradicting themselves, petitioners **elsewhere argue** that the Commission did not actually understand § 2.1.8, and thus mistakenly failed to see why the phrase "all obligations" did not include shortfall and termination obligations.

Petitioners clearly explained that the FCC obviously used section 3.3.1.Q bullet 4 to determine how accounts could transfer from plan to plan but used section 2.1.8 to determine which obligations transfer. AT&T's quote admits that petitioners **made two separate arguments** within its initial filing, as AT&T states **"elsewhere argue"** that the Commission did not actually understand § 2.1.8. What petitioners actually said was that the FCC did not understand that 2.1.8 allowed traffic only transfers. Petitioners did not state that the FCC fully did not understand 2.1.8.

60) AT&T then tries to take the same logic and apply it to petitioner's analysis of the DC Circuits decision: AT&T page 2 para 2:

> Similarly, petitioners self-contradictorily claim that the D.C. Circuit ruled in their favor, but that it, too, did not understand § 2.1.8.

Petitioners explained that the DC Circuit **did understand** that 2.1.8 allowed traffic transfers as well as plan transfers. Petitioners did not say that the DC Circuit did not fully understand 2.1.8; AT&T is trying to deceive the FCC.

Petitioners simply pointed to the statement made by the DC Circuit that said:

> This section on its face does not differentiate between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS--- the telephone service itself. (Petitioners initial filing DC Circuit opinion at exhibit C pg. 7 line 1)

61) The DC Circuit did understand that 2.1.8 allowed traffic transfers however the DC Circuit did not understand which obligations transferred because petitioners were not there to point out that the new customer accepts all obligations only on what is accepted and included within the "any" "number" of accounts transferred, then reported by the new customer to AT&T. The DC Circuit never had petitioners in depth tariff analysis of "ANY Number(s)" of accounts could be transferred and all the obligations are transferred on only those accounts which are selected for transfer.

62) The DC Circuit would have easily understood that shortfall and termination obligations do not transfer on traffic only transfers if this tariff analysis was available to it. The point here is that AT&T's attempt to make the petitioners look like its statements are "self-contradictorily" is yet another AT&T deception. On page 3 line 2 of AT&T's comments it states:

> Nor is there any merit to their fallback argument that they had "pre-June 1994" plans that were not subject to § 2.1.8's "all obligations" language.

63) AT&T again mixes apples and oranges. The fact that petitioner's non transferred plans were pre-June 17th 1994 immune from the application of shortfall and termination obligations that remained on it has nothing to do with what obligations get transferred on a traffic only transfer. Even if a plan was not pre June 17th 1994 immune from the infliction of S&T obligations that still does not mean that S&T obligations transfer on traffic only transfers. AT&T's statement is simply an attempt to confuse.

64) AT&T continues its deception on page 4 para 1:

> This dispute arose when petitioners proposed a two-step transfer that had the **evident purpose of evading the minimum revenue commitments** and associated shortfall and terminations liabilities.

AT&T provides no tariff justification how petitioners transfer of the plans to CCI and CCI/Inga's subsequent transfer of some of the traffic to PSE evades minimum revenue commitments, or evades the responsibility of shortfall and termination obligations. In fact it is just the opposite as both the District Court and the FCC explained to AT&T. The FCC has accurately stated that both CCI and the Inga Companies would continue to be jointly and severally responsible to AT&T for its minimum revenue commitments and associated shortfall and terminations liabilities that remain with the CSTPII/RVPP plans; of course AT&T also clearly made this known prior to the scam change.

65) The FCC has already agreed with the District Court's non vacated decision: See Inga Companies initial filing quoting the FCC Decision at exhibit B pg 8 -9 para 11

> Further, **CCI (as well as the Inga companies)** but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans **(Also *See First District Court Opinion* at 9.)**

More clarification: FCC Declaratory Ruling exhibit B of initial filing on pg 7 n.51

> (3) CCI would continue to be responsible to AT&T for any commitment associated with the CSTP II Plans (which would not be discontinued); and (4) PSE would assist in moving accounts back to CCI upon written notice from CCI that AT&T required CCI to meet its commitments.

66) Therefore under the traffic transfer AT&T not only has one company to pursue its shortfall and termination obligations but has **both CCI and the**

Inga Companies. AT&T is in a better position after the transaction as Judge Politan explained AT&T has an additional party to pursue" Additionally, the non refuted evidence pointed out in the FCC's 2003 Ruling that the accounts that were transferred could be returned back to petitioners.

67) Furthermore the contract between CCI and the Inga Companies, which AT&T has shows that end-user accounts were also jointly owned by petitioners and CCI. Finally the plans were immune from shortfall and termination penalties due to: (A) Pre June 17th 1994 (B) Section 2.5.7 Shortfall Waiver (C) Oct.1995 FCC Order; D) had already met their fiscal year revenue obligation. (E) First year tariffed shortfall credit. There's more but suffice it to say AT&T's statement that there was a scheme is absolute nonsense as usual.

68) AT&T again gets creative with its argument putting words in the FCC's mouth. AT&T's statement intimates that the **FCC believed** there was a fraudulent transaction: AT&T page 6 para 2:

> The Commission then addressed AT&T's claim that, because the transfers would result in fraudulent evasion of shortfall charges, AT&T was entitled to deny the transfer under the tariffs anti-fraud provisions.

The FCC actually stated on page 8 para 11.

> Based upon our review of AT&T's tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – **which we do not decide** – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE.

69) The AT&T con here is to try to make believe the FCC agreed with AT&T's bogus assertion that there was a fraudulent transaction that was attempted.

Just one of the many cons AT&T has tried in the past, and was shot down, but AT&T resurrected it due to a new audience. Maybe AT&T thought petitioners would not catch their deception this time around.

70) AT&T again attempts to misrepresent what was already argued by AT&T before the FCC. AT&T states on page 6 footnote 3:

> In so ruling, the Commission **did not consider** tariff language that authorized AT&T to prevent fraud by refusing to provide PSE the **new service** that it was requesting through the transfer.

AT&T asserts that the FCC failed to consider §2.8.2 which may be used to deny additional service in the case of suspected fraud. First of all why AT&T was even allowed to argue fraudulent use before it ever convinced any Court or the FCC that it was sure to obtain S&T liabilities is a travesty. Even if the plans were not immune it still was not justification to argue fraud.

The FCC actually stated on page 8 para 11.

> Based upon our review of AT&T's tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – which we do not decide – **those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE.**

71) AT&T's Counsel Fash admits in his July 3rd, 1996 letter that "**shortfall charges could not have been the subject of litigation**" at the time of the Jan 1995 traffic transfer because the plans "did not expire until March 31, 1996" (exhibit BB in initial filing.) Therefore AT&T had no right to assume the plans were going to go into shortfall; especially when AT&T now concedes the plans were grandfathered.

72) AT&T had absolutely no right to claim potential shortfall liabilities in the first place as the petitioners fiscal year commitments were met at the time of the traffic only transfer. It would be a violation of 201(b)[6] for being unreasonable for AT&T to even attempt to use its fraudulent use provisions on plans that already met its commitment and had pre June 17th 1994 grandfathered rights, as well as 2.5.7 shortfall waiver available.

73) AT&T's 1996 Comments pg 11 n.11 clearly shows 2.8.2 was argued and therefore considered by the FCC. Also AT&T's 2003 Further Comments pg. 5 show sections 2.8.1 and 2.2.4 were also argued. AT&T cannot be permitted to argue fraudulent use again, as the FCC Decision was not overturned regarding AT&T's illegal remedy. Additionally, the FCC's D.C. Circuit brief stated in regard to section 2.8.2 which AT&T claims the FCC did not consider:

> it is common sense that moving traffic away from CCI cannot be considered a denial of "additional service" to CCI. Similarly, PSE cannot be subject to the sanction of denial of service under its tariff for any alleged non-payment of charges by CCI .

74) AT&T's bogus statement that the FCC never considered section 2.8.2 is simply not true, but this certainly does not stop AT&T from making deliberate misrepresentations. Despite what AT&T states, this AT&T argument was absolutely included in the record leading up to the 2003 FCC Declaratory Ruling and considered by the FCC even though it was barred by section 2.1.8's statute of limitations provision of 15 days.

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[6] 201(b): Charges, practices, classifications, and regulations "shall be just and reasonable."

The FCC Decision clearly states that it evaluated sections (plural) not just one section (singular):

FCC 2003 Decision Page 14 para 21

> We also conclude that AT&T did not avail itself of the remedy specified in its tariff for suspected fraud and thus cannot rely upon the fraud sections of its tariff to justify its refusal to move the traffic.

75) AT&T continues on the bottom of page 6 into page 7:

> In stating that PSE would not assume responsibility for shortfall obligations, however, the Commission was simply describing the transfer as proposed. **Having just ruled (one paragraph earlier)** that § 2.1.8 did not apply to this transfer at all, the Commission's statement was manifestly not a ruling about what obligations PSE would have been required to assume if § 2.1.8 did apply, as petitioners subsequently agued to the district court (and now argue in their new petition).

76) AT&T again attempts to mix apples and oranges by comparing one paragraph and its meaning against a previous paragraph and its meaning. The FCC's erroneous position that section 2.1.8 did not allow traffic transfers has nothing at all to do with the FCC's use of section 2.1.8's obligations language to determine which obligations transfer on a traffic only transfer.

As noted in petitioners initial filing the FCC's delete and add transfer methodology as allowed under 3.1.Q bullet 4 was used by the FCC to determine how traffic could be transferred. However neither section 3.3.1.Q bullet 4, nor any of the CSTPII/RVPP general provisions have obligations assumed transfer language. Only section 2.1.8 has the joint and several liability language on transfers that the FCC clearly quoted in the 2003 ruling in agreeing with the District Court's non vacated decision.

77) The FCC's 2003 Ruling used 2.1.8's obligations language to interpret and decide which obligations transfer on a "traffic only" transfer. Additionally as detailed in petitioner's initial filing, the FCC also used section 2.1.8 to determine that S&T obligations did not transfer on traffic only transfers when the FCC decided against AT&T's Substantial Cause hearing in 1995. See petitioners initial filing pages 11 -14 from paragraphs 28 to 39).

78) The FCC again explained in its DC Circuit brief that the FCC used section 2.1.8 to interpret that S&T obligations did not transfer on traffic only transfers. See petitioners initial filing pages 14 -16 from paragraphs 44 through 47 for detailed FCC explanation). AT&T simply attempts to confuse the FCC that the original FCC decision could not have used section 2.1.8's obligations language because the FCC didn't use 2.1.8 to decide how traffic only could be transferred under 2.1.8. It is obvious that the FCC used 2.1.8's obligation language as the FCC explained to the DC Circuit.

79) Again we see how AT&T short quotes as on page 7 para 1 states:

> The D.C. Circuit held that "any transfer of WATS required PSE to assume CCI's obligations," id. at 7 (emphasis added)

AT&T is again up to its usual tricks by weaving its way through the DC Circuit opinion taking quotes and piecing them together to try and get the DC Circuit Decision to give the connotation that AT&T desires. The DC Circuit opinion at 7 does state that:

> "any transfer of **WATS** required PSE to assume CCI's obligations."

However go to the next paragraph on page 7 of the DC Circuit Decision which explains traffic is WATS, not just the plan.

> AT&T's basic argument before this court is that "traffic" even if it is not the same as a tariffed *plan*, is a type of **Wide Area Telephone *Service*** covered by section 2.1.8.

80) Therefore the DC Circuit is simply stating that PSE must assume the obligations on what **traffic** was transferred; and PSE indeed did assume the obligations on what was accepted for transfer. Instead of AT&T deceptively quoting the DC Circuit why doesn't AT&T simply look at its own tariff section 2.1.8(E) which confirms that shortfall and termination obligations do not transfer on traffic only transfers. Why doesn't AT&T look at section 3.3.1.Q bullet 10 which states that shortfall and termination are the responsibility of the customer (CCI). The CSTPII/RVPP plan that was not being transferred or terminated as AT&T conceded, defines CCI as an AT&T customer of record. Why doesn't AT&T look at which party it placed the deposits on (the transferor) because that is where the S&T obligations remain on a "traffic only" transfer. DC Circuit Court Judge Tatel clearly understood during oral argument what all obligations meant:

> MR. CARPENTER: -- but the tariff requires that the transferee assume the obligations as well with respect to all obligations existing at the time of the transfer.
> JUDGE GINSBURG: Well, you said all obligations.
> JUDGE TATEL: **Well, that's only if the whole plan is transferred.**

81) More AT&T deception is seen on page 8 line 4:

> In these submissions, petitioners **falsely claimed** that "the only issue referred to" the Commission was whether § 2.1.8 permits the transfer of traffic without a transfer of the plan itself, that the "D.C. Circuit has

> conclusively decided that issue in [petitioners'] favor," and that the Commission's "2003 opinion compels the conclusion that the entire `obligations' issue"-i.e., the meaning of § 2.1.8's "all obligations" requirement-"is nothing more than a red herring aimed at further delaying this case." See Exh. 6, Br. in Supp. of Pls.' Mot. to Lift Stay at 9-10 (emphasis petitioners'). See also id. at 12 ("the question of which obligations are assumed on traffic transfers without the plan has already been answered by the FCC and there is no reason to return to the FCC for a ruling on this non-issue").

The above statement is **not a false** statement. As soon as the DC Circuit accurately determined that 2.1.8 allowed both traffic only transfers as well as plan transfers it **automatically determined** that S&T obligations do not transfer on traffic only transfers under 2.1.8, because under the tariff you can not transfer away shortfall and termination obligations from the transferors CSTPII/RVPP plan as per AT&T tariff section 3.3.1.Q bullet 10 (exhibit D in petitioners initial brief) and section 5 (exhibit CC in petitioners initial brief). Shortfall and termination obligations are the responsibility of the AT&T customer which was not transferring away or terminating its CSTPII/RVPP plan as all parties agree. When the DC Circuit answered the tougher question:"Does 2.1.8 allow traffic only transfers? The DC Circuit automatically by default answered the easy question: "Which obligations transfer on traffic only transfers?" Answer: shortfall and termination obligations do not transfer on traffic only transfers.

82) When the DC Circuit correctly determined that 2.1.8 allows traffic only transfers as well as plan transfers it also ruled by default that S&T obligations do not transfer on traffic only transfers because the tariff **does not allow a CSTPII/RVPP plan to exist with zero shortfall or termination obligations**.

Under AT&T's bogus theory CCI's CSTPII plan would have zero shortfall and termination obligations after all the (S&T) obligations were transferred to PSE. The only time a CSTPII/RVPP plan has zero S&T obligations is the day the plan no longer exists! Zero obligations are not possible under that tariff for several reasons:

83) AT&T's tariff only allows for two options under the tariff: (A) transfer the plan with the accounts and in that case the S&T obligations transfer; (B) The only other option is to transfer traffic only and the S&T obligations must stay with the transferor. There is no tariffed option to transfer traffic only and transfer all S&T obligations thus leaving the transferors CSTPII/RVPP plan with zero S&T obligations and no revenue commitment.

This is substantiated by several reasons under the tariff:

84) There is no credit for over commitment carried over into subsequent years. If the commitment is 3 years at $60,000 per year and the aggregator did $100,000 in year one the commitment in year two is still $60,000, therefore there must be a shortfall & termination obligation on the CSTPII plan. The AT&T Network Services Agreement contracts and AT&T's tariff all mandate a minimum CSTPII commitment. The list of CSTPII/RVPP commitment options are all specified by tariff. The point is there must always be a commitment on a CSTPII/RVPP plan.

85) Additional tariff evidence that CSTPII/RVPP plans must having a minimum commitment is due to AT&T's CSTPII/RVPP Enhanced Billing Option (EBO).

This option mandates that AT&T will only do the end-user billing and remit a check to the aggregator if the minimum commitment is at least $600,000 per year. All aggregators transferred “traffic only” and AT&T never cut off the transferor for from EBO. See exhibit EE to petitioner’s initial filing and notice the AT&T Network Services Commitment Form mandates the aggregator to “choose one” commitment level. Additionally you will notice the plans had opted for annual commitments not monthly. There is no ZERO commitment level, therefore AT&T own contracts and tariff directly oppose its position that there can be a CSTPII/RVPP plan with zero obligations due to having transferred all of them to a transferee.

86) AT&T’s tariff under “Discontinuance With or Without Liability” provisions mandate that the **remaining commitment** be extended over a new contract period. There is no provision under this tariff section for a CSTPII with zero remaining revenue commitment. There is no third option to transfer traffic and all S&T obligations/revenue commitments and keep the remaining plan with zero obligations. When the DC Circuit correctly decided that 2.1.8 allows traffic only transfers it by default also decided S&T obligations do not transfer on traffic only transfers. The reason why AT&T cannot produce any evidence to support its theory that S&T obligations transfer on traffic only transfers and the transferors plans remains with zero commitments is because no such evidence exits. AT&T claims it has done tens of thousands of traffic only transfers and

has never shown one that supports its bogus theory. The one 2.1.8 traffic transfer AT&T produced supported petitioners.

VI. Section 2.1.8 Tariff Analysis

87) AT&T continues its deception on page 10 line 2 when it attempts to **focus in** on paragraph B and ignore the opening of 2.1.8 that defines what part of the traffic is being transferred that the obligations pertain to. AT&T states:

> For present purposes, the critical condition was set forth in section B, which stated in full: The new Customer notifies [AT&T] in writing that it agrees to assume all obligations of the former Customer at the time of the assignment or transfer. These obligations include (1) all outstanding indebtedness of the service and (2) the unexpired portion of any applicable minimum payment period(s).

AT&T's con is to take the words "all obligations" out of context of 2.1.8.

Section 2.1.8 stated in full:

> Transfer or Assignment – WATS, including **ANY** associated telephone **number**(s), may be transferred or assigned to a new Customer, provided that:
>
> A. The Customer of record **(former Customer requests)** in writing that the company transfer or assign WATS to the **new Customer**.
>
> B. The "**new Customer" notifies the Company** in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include **(1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).**
>
> C. The Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within 15 days of receipt of notification.
>
> The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. **These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum**

> **payment period(s).** When a transfer or assignment occurs, a Record Change Only Charge applies (see Record Change Only, Section 3).

88) The D.C. Circuit stated:

> This section on its face does not differentiate between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS--- the telephone service itself.

The D.C. Circuit and the FCC did not see on its face where within 2.1.8 it allowed partial subsets of traffic to transfer because it is very easy to miss. The differentiation is actually in the "any" number(s) of accounts that the new customer accepts. Any can be one, some, or most, without specification, that can be transferred. If 2.1.8 only allowed plan transfers the word "any" would have to be changed to ALL.

89) "All obligations" pertain to, or as AT&T counsel Mr. Carpenter stated depends upon, what is transferred. Under 2.1.8 at "B" "the "new" Customer notifies the Company" (Company=AT&T), what it has accepted (traffic or plan) and is then of course is obligated for "all the obligations" on "**that which it accepts."** Of course, shortfall and termination obligations are not transferred/assumed because these obligations are the Transferor Customer's obligations as per (3.3.1.Q bullet 10) that cannot be transferred from the Former AT&T Customers (plaintiffs), as AT&T admitted the plans were not being transferred or terminated.

90) If the D.C. Circuit had seen on its face the differentiation, then it would have easily understood that para. "B" pertains to what (how much traffic or the plan), is accepted and **reported by the new customer** to AT&T. Simply 2.1.8 para B is

conditional on "any" "number(s)" in 2.1.8's opening sentence and the transfer between old and new customer within Para A. **The new customer accepts the obligations only on the WATS it accepts.** AT&T's has simply taken the phrase all obligations out of context. This is the reason why AT&T cannot produce any evidence to support its bogus theory that S&T obligations transfer on traffic only transfers, because no such evidence ever existed; despite the fact that AT&T claims it has done tens of thousands of traffic only transfers and still does them today, without the S&T obligations transferring. Later petitioners will demonstrate this further using subsequent 2.1.8 versions.

VII. Section 2.1.8 Was Not Explicit To Say the Least

91) AT&T also states on page 10 para 1:

> The phrase "all obligations" inescapably **meant** that a transferee had to accept each and every obligation of the transferor with respect to the traffic, or service, transferred.

What AT&T claims it **meant** to say and what 2.1.8 actually states are obviously two different things as AT&T readily concedes.

92) Clearly, 2.1.8 contains no such specific reference to S&T obligations. The FCC correctly noted Rule 61.2 at pg. 10 footnote 65 which is at exhibit B to petitioners initial filing, stating:

> Pursuant to Rule 61.2, titled "Clear and **explicit** explanatory statements, as in effect in January 1995, in order to remove all doubt as to their proper application, all tariff publications must contain **clear and explicit explanatory statements** regarding the rates and regulations." 47 C.F.R. 61.2 (1994). It is well settled rule of tariff interpretation that "tariffs are

> to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls, **for the user can not be charged with knowledge of such intent or with the carriers canon of construction.** Associated Press Request for a Declaratory Ruling, 72 FCC 2d at 764-765, para. 11 (quoting Commodity News Services, Inc. v. Western Union, 29 FCC at 1213, para. 2.)"

93) See also 47 C.F.R. § 61.2 (stating that all tariff publications must contain clear and explicit explanatory statements regarding rates and regulations). **Any ambiguities are construed against the carrier.** See Commodity News Services, Inc., v. Western Union, 29 FCC 1208, 1213, aff'd, 29 FCC 1205 (1960).

94) This is not the first time AT&T has conceded that section 2.1.8 was not explicit. Here are just four examples of many regarding AT&T's concession that section 2.1.8 was not explicit:

> I) Plaintiffs, relied on the ground that AT&T had filed and withdrawn a tariff transmittal (No. 8179) that did no more than codify the existing requirements of AT&T's tariff (emphasis in original). AT&T June 2005 at p. 8.
>
> II) A subsequent clarification that 'all obligations' [in 2.1.8] include shortfall and termination obligations does not alter the breadth of the earlier version, (March 27, 2006 letter)
>
> III) AT&T explicitly and consistently maintained that the proposed change was a clarification. (AT&T's May 22nd 2006 brief pg 3)
>
> IV) AT&T submitted a proposed revision of section 2.1.8 that "would have" stated explicitly that liability for shortfall and termination charges was encompassed by the phrase "all obligations. (May 22nd 2006 pg. 2)

95) These AT&T statements are obvious concessions that at the time of the denied Jan 1995 traffic transfer AT&T's tariff section 2.1.8 was **not explicit.** In addition petitioners can cite statements from each Court and the FCC stating that 2.1.8 was not explicit. Clearly, 2.1.8 contains no such explicit reference to the transferring of S&T obligations on traffic only transfers in Jan 1995.

96) The FCC also agreed with the District Court that 2.1.8 was ambiguous during DC Circuit oral argument:

> MR. BOURNE: Well, Judge Tatel, the Commission looked first at the language of Section 2.1.8 and found the language to be **ambiguous,** and concluded that **as the district court had**

Mr. Bourne during oral argument reminded the DC Circuit that it had always adhered to laws regarding tariffs needing to be explicit:

> MR. BOURNE: And the Commission's rules **require tariff provisions to be clear and explicit, and this Court has declined to enforce tariff provisions against customers in the past** when they failed that rule. And the Commission found that that was the case here.

97) The undisputed fact here is that AT&T clearly admits 2.1.8 was not explicit in Jan 1995 and by law it must be explicit; therefore AT&T must be found in violation of its tariff, especially at this stage where this case has gone past full circle.

98) Incredibly AT&T spent 2 pages defining what the word "all" meant and then actually cited cases that are totally irrelevant to the one at hand. None of the cases AT&T has cited has a situation where the transferee assumes obligations for which it did not buy. It is as absurd as John Doe selling one of three cars that he owns to Jack Smith and Jack Smith is being asked to be obligated for the two cars that he didn't buy! This is not a question in which AT&T doesn't know this. AT&T is intentionally misrepresenting itself.

99) Petitioners understand that the New Customer has to **assume all the obligations** on the WATS which it accepts from the old customer. That's the way

2.1.8 worked then and that's still the way it is done today. Section 2.1.8(E), section 3.3.1.Q bullet 10, Section 3.3.1.Q 6& 8 and section 5 all support petitioners analysis of 2.1.8. This is the reason why AT&T cannot produce any evidence to support its bogus theory.

100) A further parallel showing that **all plan obligations are not activated unless all service is transferred** is seen by a study of AT&T tariff section 5 which is found in petitioner's initial brief at exhibit CC:

> 5. Discontinuance of AT&T's 800 Customer Specific Term Plan II- with Liability- When a Customer has AT&T 800 Services covered under the Plan, **disconnection of anyone of the services does not constitute discontinuance of the plan.** Except for conditions covered in section 3.3.1.Q.4, preceding, discontinuance of **all service** furnished under the CSTPII prior to the expiration of the applicable term, constitutes discontinuance of the plan and will result in customer liability as specified following. The amount due the company upon discontinuance will be---35% of the remaining term plan revenue commitment.

101) The termination obligation of a customers CSTPII plan is based upon the revenue commitment of the customers plan further substantiating that termination and shortfall obligations are the responsibility of the transferor. Shortfall obligations can not be transferred away unless the entire plan is transferred away. Also notice that there is no plan obligation liability (termination) unless **ALL SERVICE,** (the traffic) on the customer plan is discontinued from the customers plan. Here **ALL** means **ALL traffic and does not pertain to anything other than 100% of the traffic.** Correspondingly, the obligations to transfer S&T obligations do not come into play unless all (100%) of the accounts are transferred, which did not happen. Section 2.1.8's all obligation language relates to all the obligations for what is selected and reported by

transferee to AT&T. S&T obligations are plan obligations not traffic obligations such as indebtedness.

102) Petitioners were experienced in traffic only transfers and knew exactly what they were doing by leaving **18 accounts** on the CSTPII plan, so **ALL Service** was not transferred, thus the S&T obligations remained with petitioners CSTPII plan and also perfectly tying in with section 3.3.1.Q bullet 10 (exhibit D) of petitioners initial filing. Section 3.3.1.Q bullet 10 clearly states that S&T obligations are the customers and the customer is defined by plan ownership. Furthermore, AT&T's own senior counsel Charles Mr. Fashs' letter explained at exhibit H of petitioner's initial filing also conceded the CSTPII plan structure remained in tact as long as **all the accounts** were not transferred.

103) AT&T spends pages trying to explain what the word include could mean and cites various definitions. This is self defeating because if **anyone needed to spend that much time trying to figure out what 2.1.8 meant it would be considered not explicit**. Therefore under the law AT&T must lose. (Petitioners will explain later in detail at paragraphs 294-305, that it does not make a difference what obligations are listed after the phrase "These obligations include:")

If ever there were a tariff section that was the poster boy for confusion it was 2.1.8. Consider that multiple Judges (including our current Supreme Court Justice John Roberts) as well as the FCC found it totally ambiguous. The FCC noted in 2003 it was ambiguous and it thought at that point it got it right. This

case should be used as thee example of how huge carriers will be able to destroy companies due to a tariff provisions ambiguity. Lawsuits are started over tariff provisions and the little guy gets put out of business in the mean time. The FCC can and must rule against AT&T on ambiguity.

VIII AT&T Deliberately Misinterprets What PSE Must Assume

104) AT&T's tariff analysis also falsely quotes petitioners:

AT&T states on page 15 para 1:

> Simply put, while customers may have had discretion about what benefits to transfer, § 2.1.8 conditioned the transfer on the transferee's assumption of "all obligations of the former Customer," **not merely those obligations the new customer chose to accept and report.**
>
> And
>
> A transferee had no discretion under § 2.1.8 to decide which obligations it would or would not accept.

105) Petitioners **never said** that PSE has discretion to choose which obligations it wishes to assume and conversely which of those that petitioners would transfer. The transferee (PSE) only has the discretion to choose how many end-user accounts it wants or whether it wants the entire plan. Once the transferor (CCI) and the transferee (PSE) agree on what accounts were to be transferred, PSE must then assume **all the obligations** on only what part of WATS it accepted, which PSE did.

106) If PSE accepts just part of the traffic it must assume all the obligations on all the traffic it accepts. The revenue commitments do not transfer and hence the shortfall and termination obligations do not transfer because those are the

transferors Customers plan commitments, as AT&T explained prior to the FCC Decision.

The FCC's Counsel correctly stated to the DC Circuit the accounts do not have shortfall commitments:

> MR. BOURNE: each individual end user doesn't have a particular level of commitment.

107) AT&T is intentionally confusing PSE's discretion to choose accounts with its requirement that it must assume all the obligations on those accounts it accepted. PSE did not attempt to choose which obligations it wanted. The FCC should see on page 4 of Exhibit F to petitioners initial filing PSE states:

> Please find a **properly executed** AT&T transfer of Service Agreement (TSA) to move all of the end-user locations, except the 181 account number and the 131 lead number into PSE's CT516. (CSTP/RVPP Plan ID #003690)

PSE was not seeking to alter 2.1.8's obligation language. It was properly doing a traffic only transfer as it had done numerous times prior with no S&T obligations transferring.

108) To further detail how ridiculous AT&T position is, the FCC must consider under AT&T's bogus theory that PSE's obligations would have to also include on the **traffic that was not transferred** from CCI. Under AT&T's bogus theory PSE would have to also assume the bad debt on the traffic that it never accepted! According to AT&T's bogus theory all obligations transfer and that would also mean 100% (all) the transferors' bad debt responsibilities would transfer as well. The tariff is clear as per CSTPII general provisions 3.3.1.Q bullet 6 and 8 that

AT&T would debit PSE for the accounts that went to its plan and CCI would be debited for the bad debt on the accounts that remained on its plan as Judge Politan's non vacated decision detailed.

109) However under AT&T's bogus theory CCI would have zero bad debt responsibilities left and thus PSE would be responsible for paying the bad debt of CCI's remaining end-users that were not transferred, because AT&T claims PSE has to assume "**all obligations"** which obviously include indebtedness. Absolutely ridiculous and impossible under the tariff! Under the tariff the bad debt (indebtedness under 2.1.8) is deducted from the RVPP credit pool of the CSTPII/RVPP plan holder; see 3.3.1.Q bullet 6 and bullet 8. This also proves that all obligations pertain to only what is transferred.

110) There are no tariff provisions that would make PSE liable for the indebtedness on the traffic that remained on CCI's plan. Obviously indebtedness is included in all obligations, but according to the tariff (3.3.1.Q bullet 6 and bullet 8) PSE is not liable for indebtedness on the accounts that are not accepted. Likewise PSE is also not obligated for CCI's CSTPII plan commitments (S&T obligations) because as with the obligation for indebtedness on the accounts that were not transferred, those obligations are not PSE's responsibility, as AT&T argued to Judge Politan.

111) Additionally AT&T can not even claim that PSE would be jointly and severally liable for the indebtedness on the accounts that remained on CCI's plan because 2.1.8(E) of course does not even address minimum payment period

or indebtedness. The obvious reason is that the bad debt and minimum payment period commitments for the accounts that remain on CCI's plan are only those obligations of CCI; as are the S&T obligations that also do not transfer.

112) For AT&T's bogus obligation theory to work it would be expected that PSE also had to be obligated to assume the bad debt on the accounts not transferred; and that is clearly not the case. This again confirms that PSE is responsible for all the obligations on the accounts it accepts. All the tariff sections 2.1.8(E); section 5; Section 3.3.1.Q bullets 6, 8, and 10 all support the position that S&T obligations do not transfer on a traffic only transfer. Of course exhibit J in petitioners initial filing shows S&T obligations are not mandated to transfer; never were and still aren't today. It has been one deliberate big AT&T con game on the US Judicial System.

IX. If 2.1.8 Covered Joint And Several Liability On Traffic Only Transfers Plaintiffs Plans Would Have Been Exempt Anyway

113) AT&T strongly argued to the District Court that it clarified 2.1.8 by filing 2.1.8(E). However, if AT&T's bogus theory is correct that (S&T obligations transfer on traffic only transfers and CCI only remains jointly and severally liable, and not actually liable for S&T obligations) plaintiffs' plans would have been exempt from joint and several liability charges under 2.1.8 E (c) anyway in fiscal year 1995!

114) As per the July 3, 1996 Fash letter, plaintiffs' fiscal year end was April 1st 1995 through March 31st 1996. As per 2.1.8E (c), this commitment period was a

"commitment period after the commitment period that includes the Effective Date of the transfer." Specifically: The effective date of the transfer was Jan. 1995 which of course was within the prior April 1994 – March 31st 1995 commitment period.

115) The point that petitioners made is valid. AT&T bogusly argues that joint and several liability applied to traffic only transfers. If AT&T's bogus theory was true then 2.1.8E which addresses the duration of how long a transferor remains obligated for joint and several liability would address traffic only transfers. However, 2.1.8E does not say anything about traffic only transfers.

116) Even under AT&T's bogus theory, AT&T knew in Jan 1995 that the revenue commitments were already made for the previous fiscal year (April 1994 March 1995). Then when the new commitment period started (April 1995 March 1996) there would be no joint and several liability left as AT&T pointed out. Therefore AT&T was in no position to argue for liability on CCI as under even AT&T's bogus theory CCI's potential for liability would have disappeared.

117) Petitioners hope that the FCC is understanding that is argument is all hypothetical based up AT&T's bogus analysis that joint and several liability pertains to traffic only transfers, when in fact it doesn't. Petitioners were showing that even under AT&T's bogus theory AT&T still had no justification to deny the traffic only transfer.

X. AT&T Tries to Cover Up for Previous Traffic Only Transfers

118) Continued AT&T nonsense page 18 footnote 10:

> Petitioners claim that, because they had previously transferred traffic to another aggregator, their shortfall and termination obligations had already been transferred away, and thus could not be transferred to, or assumed by, PSE. Id As AT&T has explained, however, those prior transfers did not divest petitioners of their obligations

AT&T above addresses the 1993 traffic only transfer from Inga Companies to Ameritel; see exhibit Y to petitioners initial filing) AT&T again bases this argument on its brand new minted defense that when a transferor does a traffic only transfer the actual revenue commitments transfer to the transferee and the transferor remains jointly and severally liable.

119) AT&T's argument fails for a several reason:

(A) S&T does not transfer on traffic only transfers as AT&T's pointed out to the District Court, the Third Circuit and the FCC in 2003 as all the quotes indicated. AT&T needed to change its correct position to the bogus one when the case began to focus on which obligations transfer on a traffic only transfer. AT&T original position to the FCC was correct:

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated under the tariffed plans, in terms of the ***transfer*** **of such accounts** the Petitioners would, **but for** the attempt to bifurcate the traffic from the **underlying plans, remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer. (Exhibit Z to petitioners initial filing.)

120) If CCI was jointly and severally responsible for S&T obligations that would mean by definition that the actual S&T obligations transferred to PSE. However AT&T made it clear to Judge Politan in 1995 that PSE was not obligated to assume CCI's plan obligations. From the District Court's 1995 non vacated

Decision on page 12 line 2; originally page 67 of Joint Appendix to the DC Circuit:

> **AT&T replies** to that assertion by arguing that since only the traffic on the plans was passed to PSE, and "**not the plans themselves with their attendant liabilities,"** PSE's standing and credit-worthiness was **irrelevant to the potential for shortfall and termination liability**. Absent an acceptance by PSE of the **Inga companies' commitments on the plans,** AT&T would not authorize the CCI/PSE transfer.

121) If S&T obligations actually did transfer on traffic only transfers and the Inga companies under AT&T's bogus theory were jointly and severally obligated the Inga Plans were restructured several times into new commitment periods after Jan 1995 and thus as per 2.1.8E(c) the Inga plans had no remaining S&T obligations.

122) Under AT&T bogus theory the Inga Companies would have had only joint and several liability obligations left when it completed its traffic only transfer with Ameritel and Tel-Save; the actual obligations would have gone to the other two aggregators. Because the Inga Companies then transferred its plans to CCI there would be no S&T obligations under AT&T's bogus theory to CCI because the tariff does not require **the 3rd transferee (CCI)** to be obligated for joint and several liability S&T obligations of the Inga Companies. In other words 2.1.8 only addresses the Former and New Customer, not a 3 generations back. Remaining jointly and severally liable only occurs when the actual S&T obligations transfer between the former customer and the new customer. Under AT&T's bogus theory CCI would be the 3rd generation transferee and therefore even **under AT&T's bogus theory** CCI still would have zero obligations.

123) In actuality the fact is that CCI did have the actual obligations (not joint and several liability obligations) as per AT&T's position to Judge Politan and the FCC. Therefore even under AT&T's bogus theory it again defeats itself. Of course it also fails because this is now another brand new bogus defense never before heard prior to this year and thus it fails under the section 2.1.8's statute of limitations provision of 15 days. AT&T had 15 days to conjure up a defense not 12 years.

XI AT&T Misinterprets the DC Circuit Decision

124) AT&T quotes the D.C. Circuit Opinion at 9 and tries to tie it to the transaction at hand.

> As the D.C. Circuit has explained, "even if small scale transfers of traffic were **outside the scope of Section 2.1.8**, allowing this transaction to go through would create an obvious end-run around the unquestioned rule that new Customers had to `assume all obligations' in transferring WATS ***plans."***

What the DC Circuit was referring to as being **outside the scope of 2.1.8** was the FCC's theory that the tariff allows traffic only transfers under the FCC's delete and add theory as per section 3.3.1.Q bullet 4. The end run around that the DC Circuit is referring to is not using 2.1.8's all obligations language but to evade 2.1.8 by using the FCC's (delete and add) account transfer methodology as per section 3.3.1.Q bullet 4.

125) Look at the DC Circuit Decision in which the actual parties are stated and it states it was within

(not outside the scope) of 2.1.8 and further detailed that the 2.1.8 was used "**instead of dropping and adding traffic in separate transactions.** "

DC Circuit at page 9 para 1, line 2

> CCI and PSE did request a transfer--- a transaction on its face at least potentially **within the reach of Section 2.1.8**, which governs "Transferors or Assignment"---**instead of dropping and adding traffic in separate transactions**.

126) What the DC Circuit was describing in AT&T cite was the hypothetical delete and add scenario the FCC had used as an analogy as to **how the traffic could transfer**. The DC Circuit could not possibly refer to the actual traffic only transaction between CCI and PSE because the DC Circuit was talking about a **plan** transaction **outside the scope of 2.1.8** .

127) Petitioners did not use section 3.3.1.Q bullet 4 delete and add which would be outside the scope of 2.1.8. Petitioners used section 2.1.8 to bulk transfer its traffic and adhered to the obligations language of 2.1.8. Additionally the DC Circuit in its last line of AT&T's cite the DC Circuit was talking about **all obligations** but it stated it was on a **plan** transfer. Obviously petitioners did a traffic only transfer in full compliance with section 2.1.8., not a **plan** transfer as the DC Circuit is referring to in reference to the FCC's hypothetical delete and add account movement methodology.

128) Furthermore just look at the next sentence after the one that AT&T cites:

DC Circuit page 9 paragraph 2:

> **Any reseller** could circumvent Section 2.1.8 simply by asking AT&T to move its business **one billed telephone number at a time.** Using such a

> scheme, a reseller could move every component of a plan, save its obligations to AT&T.

129) The DC Circuit above is referring the FCC's 3.3.1.Q bullet 4 delete and add account movement methodology. The phrase, "any reseller," was not referring to the CCI-PSE transaction under 2.1.8., as the DC Circuit was referring to a transfer in which it was done "one billed telephone number at a time." The CCI-PSE traffic only transfer was not done "one billed telephone number at a time" but utilized section 2.1.8 to do a **bulk transfer** of accounts designated. In typical AT&T fashion it again short quoted the DC Circuit and attempted to state the opposite of what the DC Circuit was actually saying.

130) The DC Circuit's last statement also confirms that what it was referring to was the FCC's account transfer methodology of deleting and adding accounts under 3.3.1.Q bullet 4.

The DC Circuit states on page 11 para 1:

> All we decide is that Section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 Services **without assuming any obligations**.

131) In the above cite the phrase "without assuming any", obviously means PSE can't assume no i.e. zero obligations. Petitioners agree with this statement 100%! That is why in the transaction at issue PSE assumed all the obligations on all the accounts that it accepted, specifically the minimum payment period and the indebtedness. The DC Circuit is absolutely correct and then even footnotes on page 11 fn 2 and states what those obligations are under 2.1.8.

The District Court's May 1995 Decision which was not vacated and thus becomes the "law of the case" makes it very clear:

> **The Inga Companies and CCI** followed the transfer section of the tariff to the letter, they ought not now be forced to deal with a unilateral change of the rules by AT&T.

As usual AT&T is misrepresenting the DC Circuit Decision.

XII AT&T Misrepresents That it Can Charge End-Users for Shortfall and Termination Obligations

132) AT&T intentionally misinterprets Section 3.3.1.Q and its statements are directly opposed to AT&T's former position, but what else is new.

AT&T states on page 20 paragraph 2:

> This provision simply made clear that the reseller/aggregator (the "Customer") was responsible for shortfall and/or termination liability, even though **AT&T had the right to collect any sums due directly from the reseller's customer (the "individual locations under the plan.**

AT&T Tariff section 3.3.1.Q bullet 10 reads:

> **Shortfall and/or termination liability are the responsibility of the Customer.** Any penalty for shortfall and/or termination liability will be apportioned according to usage and billed to the individual locations designated by the Customer for inclusion under the plan. For billing purposes, such penalties shall reduce any discounts apportioned to the individual locations under the plan.

133) AT&T had no right to collect payment form the end-uses because the end-users were not AT&T's customers. AT&T attempts to confuse the law with the Enhanced Billing Option program that was chosen. AT&T has already conceded that the billing option used by CCI in which AT&T bills the end-users,

does not determine that the end-users are AT&T Customers or that it gives AT&T the right to bill shortfall and termination charges against CCI/Inga's end-users.

134) AT&T has already made its position very clear that the end-users were not AT&T's.

AT&T's 2003 Further Reply Comments to the FCC page 1:

> AT&T did not have any carrier relationship with Petitioners' customers (the "end-users"). Petitioners do not dispute the accuracy of these statements; just to the contrary, they repeatedly concede that they and not AT&T had the exclusive carrier-customer relationship with the end-users. Similarly the Petitioners acknowledge that "**although AT&T also rendered bills** to Winback & Conserves end-users on the behalf of the latter entity, **the billing arrangement** selected by the reseller **did not create any carrier–customer relationship between AT&T and the end-users.**

AT&T's 2003 Further Reply Comments to FCC Page 4:

> Petitioners also concede that the *liability* for all charges incurred by each location was solely that of the petitioners not the end-users.

AT&T's 2003 Further Reply Comments to FCC page 4:

> As AT&T's customers-of-record, Petitioners were responsible for the tariffed shortfall and termination charges. Section 3.3.1.Q of AT&T FCC No 2 See also AT&T Further Comments filed April 2nd 2003 ("AT&T's Further Comments 2003") at 7-8.

135) AT&T had no right to bill end-users for shortfall charges since they were not AT&T's customers. See FCC Oct 17th 2003 Decision fn. 52. Exhibit B to petitioner's initial filing.

The FCC 2003 Ruling:

> **As AT&T concedes, the end-users or "locations," were CCI's customers, not AT&T's.** *See* AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd at 16075,

> para. 3; *First District Court Opinion* at 3); *see also MCI Telecommunications Corp v. AT&T*, File No. E-90-28, Order, 7 FCC Rcd 5096, 5100, para. 20 (CCB 1992). Because these end-users did not choose AT&T as their primary interexchange carrier, **AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them.** *See Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998).

136) AT&T has no right to apply shortfall to the end-users. That is why it states AT&T can reduce the discount not charge the end-users for shortfall. In essence what AT&T is doing is not charging the end-user but taking the discounts away from its aggregators plan.

AT&T again intentionally misleads by using an example of a non aggregator/reseller customer at AT&T page 20 footnote 12:

> This feature of the CSTPII Plan was **not confined to reseller customers**, but also applied to any entity that subscribed to that plan. For example, in the case of a corporate parent that subscribed to a CSTPII Plan for the use of itself and its subsidiaries, § 3.3.1 Q bullet 10 permitted **AT&T to proceed against the affiliates even if the parent entity was unable to satisfy its shortfall obligation.**

137) AT&T is quite aware that it is mixing apples and oranges with this statement. In the aggregator situation AT&T has no right to "proceed against the affiliates." The FCC is well aware that AT&T must be treated as if it was passing magnetic billing tape to the aggregator and the aggregator did its own billing. In the traditional sense of aggregation/resale AT&T would not have the opportunity to charge the end-users of its aggregators anything. Of course AT&T knows this but is hoping for an inexperienced Judge in the DC Circuit.

AT&T knows it won't get this so called "ability to bill aggregator's end-users" nonsense by the FCC.

AT&T states on page 20 para 2:

> The provision nowhere stated, much less mandated, that, if the locations and their associated traffic were transferred to another reseller, that the **transferor's shortfall and termination obligations had to remain with the plan,** and could not be assumed by the transferee.

138) The point that petitioners made conclusively establishes that 3.3.1.Q bullet 10 mandates that S&T do not transfer. 3.3.1.Q bullet 10 states

> Shortfall and/or termination liability are the responsibility of the Customer.

Let's look at termination liability first. Because petitioners plans were not being terminated or transferred as AT&T has conceded, and the termination obligations are plan obligations of CCI the termination obligations must stay with the customers plan. The responsibility for the termination was petitioners. AT&T has stated so itself:

139) The FCC's Oct 17th 2003 Declaratory Ruling agreed with AT&T's 1996 brief to the FCC determining that CCI's plans were not being terminated. See FCC Declaratory Ruling exhibit B pg 8 Footnote 56 in petitioner's initial filing.

> Although AT&T also argues that the move also avoided the payment of tariffed *termination* charges, *id.*, it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term**) is not at issue here**. Opposition at 3 n.1. **That is consistent with the facts of this matter; petitioners never terminated their plans.** Accordingly, termination charges are not at issue in this matter.

140) Simply: The plans termination obligations can not transfer because the termination obligation is the responsibility of the Customer and a Customer is

defined by the ownership of the plan that is not terminating or transferring the plan. Like wise with Shortfall obligations: The plans shortfall obligation can not transfer because the shortfall obligation is the responsibility of the Customer and a Customer is defined by the ownership of the plan which is not transferring the plan and had already met its revenue commitment. Even if petitioners had not met its revenue commitment AT&T could not mandate that the shortfall obligations must transfer unless it was a plan transfer.

XIII AT&T Attempts to Confuse Shortfall and Termination Obligations with Shortfall and Termination Liabilities

141) AT&T's asserts the following page 21 para 1.

> The first half of the November 1995 version of § 2.1.8, which petitioners failed to provide, states that "WATS, including any associated telephone numbers, may be transferred." See Exh. 10. This is the same language that the D.C. Circuit held includes transfers of traffic as well as plans. This version of § 2.1.8 then says (1) that the new customer must assume "all obligations," including "any applicable shortfall or termination liability**(ies),"** and (2) that the transferor "remains jointly and severally liable for any obligations existing as of the Effective Date of the transfer," including "any applicable shortfall or termination liability**(ies)."** Far from "directly confict[ing]" with the plain meaning of "all obligations," therefore, the November 1995 version of § 2.1.8 expressly confirms what was clear in the earlier version: that a transferee had to assume all obligations, including shortfall and termination **obligations,** when traffic was transferred.

142) The November 1995 tariff change does not alter at all the fact that shortfall and termination OBLIGATIONS do not transfer on traffic only transfers. AT&T attempts to confuse the FCC by intentionally making the FCC believe that "**liabilities"** that exist at the time of the transfer are the same as the

CSTPII/RVPP plans Shortfall & Termination **obligations**. Liabilities occur when there is **a failure to meet obligations**. There is a major difference. AT&T said so itself to the Third Circuit:

AT&T REPLY brief to the Third Circuit: Page 4 paragraph 3:

> Ironically, the CCI Br. (at 32-34 & 36-38) relies on the District Court's finding that the earlier transfer of the **entire plan** from the Inga Companies to CCI did not threaten evasion of shortfall liabilities. See May 19, 1995 Order-at 22-24 (AA 1049-51). **But that is because the shortfall liabilities there followed the traffic,** as **it would not** in the proposed transfer from **CCI to PSE at issue in this appeal**.

143) The same tariff analysis that petitioners have furnished prior regarding all obligations pertaining to what is transferred still applies to November 1995. What was added on a **prospective basis** to 2.1.8 in November 1995 was shortfall and termination liabilities that exist at the time of transfer.

144) This was a prospective tariff change so petitioners were not exposed to this; however even if petitioners were exposed to this it wouldn't pertain to petitioners because petitioners plans had no shortfall and termination liabilities at the time of transfer. The plans in fact had already met its fiscal year commitment and were still pre- June 17th 1994 grandfathered.

145) AT&T replaced Tr. 8179 with Tr. 9229 and Transmittal 9229, became effective November 9, 1995 on a prospective basis. 47 C.F.R. § 61.54 mandates that tariffs contain certain codes and symbols. A copy of the code/symbol key is at exhibit **Q** of petitioner's initial filing. The November 2.1.8 tariff change contains the letter "C" on the right hand side as part of the tariff revision next to the addition of S&T **liabilities.** As can be plainly seen, adding S&T **liabilities** to

Section 2.1.8 was undeniably a substantial change and, therefore, required a "C" designation.

146) If the revision was a mere clarification as AT&T incorrectly asserts, the FCC would have permitted AT&T to use the letter "T" to signify a change in text but no change in the rate or regulation. The November 1995 language change that was made to 2.18 had no affect on traffic transfers. It did have an affect upon plan transfers that had liabilities on its plan due to failure to meet its obligations at the time of the **plan** transfer. Petitioners were not in danger of meeting its revenue commitment to produce "liabilities" from not meeting commitments.

147) In fact the evidence shows petitioners were not only the largest aggregator but were one of a few that was substantially over commitment. As the exhibit states on the bottom of this version of 2.1.8, it was only applicable to transactions after November 1995, and plaintiffs did its traffic only transfer in Jan. 1995.

AT&T Counsel Mr Meade certified to District Court Judge Politan in 1996 exhibit N to initial filing that Tr. 9229 was a **substantive change**.

> The FCC was concerned that the modified language in Section 2.1.8(c) would have had a "broader effect" than was needed to achieve AT&T's specific purpose, which was simply to clarify its existing right to prevent a location transfer intended to avoid payment of charges, and so would constitute **a substantive tariff change**.

148) All substantive tariff changes are prospective under the law. See exhibit N to petitioners initial filing in which AT&T counsel Mr. Meade

certified to the District Court that 9229 transmittal which became the November 1995 tariff change had no affect on petitioners:

> Because this is new, it will apply only to newly ordered term plans, and so would **not be determinative** of the issue presented on the CCI/PSE transfer.

149) The FCC's decision was clear that no changes after January 1995 would affect plaintiffs' transaction :(Page 11 para 14 exhibit B to petitioner's initial filing)

> "We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern resolution of this matter.

150) There never was a 2.1.8 tariff revision which ever mandated that revenue commitments and S&T obligations transferred on traffic only transfers. That is why **exhibit J** to petitioners initial brief (an AT&T 2/23/02 version of the AT&T section 2.1.8 TSA) states that S&T **may** transfer. Yes it would if you do a plan transfer! AT&T's current bogus tariff analysis that all obligations must transfer on a traffic only transfer would dictate that its revised 2.1.8 section in 2002 would have to say "**must**" not "**may**" transfer. Of course AT&T never addressed this exhibit because it confirms petitioner's tariff analysis is correct. Of course AT&T's has no evidence to support its bogus theory.

151) The FCC should also notice that AT&T claims that November 1995 added 2.1.8(E) section which has no **"C"** for change should not be used to evaluate 2.1.8 but AT&T then states that the November 1995 2.1.8 section which is designated

by **"C"** for substantive change and states effects transactions after November 1995 should be used for the FCC's tariff interpretation. In fact it should be the opposite. The FCC can clearly see that 2.1.8(E) was a detailed explanation of how 2.1.8 worked in regard to joint and several liability being addressed only on plan transfers. Because 2.1.8E further confirms that shortfall and termination obligations do not transfer on traffic only transfers AT&T states it is "not controlling.

152) The plans revenue commitments and the shortfall and termination obligations are the transferor plan obligations that do not transfer under a traffic only transfer. The tariff does not allow the separation of plans commitments from the plan. The New Customer (PSE) must assume all the obligations that pertain to what the Former Customer CCI and the New Customer (PSE) have agreed to be transferred.

153) The key part of all versions of 2.1.8 in Jan 1995, revised November 1995, and the revised May 1996 is the **"ANY**" word in the opening of 2.1.8. Then the new Customer assumes all the obligations on what that "ANY" amount of accounts is.

It is very important for the FCC not to be misled by what obligations are listed after the phrase in 2.1.8 that says:

These obligations include:

154) Even if all the plan obligations (revenue commitments, shortfall obligations, termination obligations) are listed that does **not** mean that all those obligations

get transferred. It is a complete red herring. Most people would expect that all the obligations listed after the phrase:

"These obligations include"

would be what obligations are transferred/assumed—not the case in 2.1.8.

In Jan 1995 the only two obligations that were listed were agreed upon for transfer by CCI and PSE; however to fully understand 2.1.8 the FCC needs to see how petitioners correct tariff analysis worked in subsequent 2.1.8 versions.

As AT&T counsel explained to the DC Circuit, "all obligations" depend upon what is transferred:

This can be further evidenced by AT&T's May 1996 version of 2.1.8.

See Petitioner's EXHIBIT REPLY C page 163

155) Here is the opening:

> 2.1.8. Transfer or Assignment - WATS, including ***any*** associated telephone numbers, may be transferred or assigned to a New Customer, **subject to each of the following provisions**:

Here is the smorgasbord list of obligations and the plan obligations that were prospectively added to 2.1.8 are bolded and underlined:

> **B.** The New Customer notifies AT&T in writing (using the same Transfer of Service form signed by the Current Customer)* that it agrees to assume all obligations of the Current Customer as of the Effective Date of the transfer. These obligations include, for example: all outstanding indebtedness for the service, the unexpired portion of any applicable minimum payment period(s), **the unexpired portion of any term of service and usage and/or revenue commitment(s), and any applicable shortfall or termination liability(ies).**

156) When you study the prospective May 1996 version of 2.1.8 and focus in **only on paragraph "B"** it appears as if this version does not allow traffic only

transfers. It appears that it only allows plan transfers if you were to only look at the obligations laundry listed. Because this 2.1.8 version lists as obligations the entire plans remaining revenue commits, (**the unexpired portion of any term of service and usage and/or revenue commitment(s),**) most transferors/transferees would think that the entire plan had to be transferred and therefore traffic only transfers were not allowed!

157) This is the red herring and the confusion and why AT&T not only fails on the merits but is also in violation of laws which require tariffs to be explicit. As seen below the May 1996 version of 2.1.8 still allows traffic only transfers!

Traffic Transfer Section:

> (c) The Customer has requested that AT&T **"remove specified locations or telephone numbers from the Pricing Plan"**, and the total annualized charges or usage from the locations or telephone numbers **that would remain under the Pricing Plan** are less than 50% (during the first six full billing months of the term of the Pricing Plan), or 85% (after the sixth full billing month of the term of the Pricing Plan), of any **currently applicable commitment under the Pricing Plan**. Such total annualized charges or usage will be determined using the same methodology as specified in (b), preceding.

158) Obviously you can still do a traffic only transfer despite having plan commitments listed within 2.1.8! How can that be? Very simple! As petitioners have explained, "All the obligations that pertain to only what has been selected for transfer are considered from the list! Since the plan does not transfer on a "traffic only" transfer the plan obligations listed do not pertain. Simple!

159) AT&T's counsel Mr. Carpenter wasn't talking about de minimus transfers he was talking about how 2.1.8 worked for all transfers.

> Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.
> Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred.

David Carpenter supporting petitioners during Third Circuit Oral Argument:

> We point out in our brief that there's a distinction between transfers of entire plans, and transfers of individual end-users locations. That when the "**plan"** is transferred, **"all the obligations"** have to go along with it. (exhibit V in petitioners initial filing Pg 15 line 9)

See Carpenter again at exhibit V. in petitioners filing Pg 15 line 23…

> When you're transferring **all** the traffic, you're transferring the **plan**. That is –and the obligations have to go with it, shortfall and termination liability. (emphasis added)

160) AT&T in this May 1996 version of 2.18 attempts to clarify that the obligations laundry list pertains to what is included within the "ANY" amount of the plan by adding "**subject to each of the following provisions"**.

> **2.1.8. Transfer or Assignment** - WATS, including "***any"*** associated telephone numbers, may be transferred or assigned to a New Customer, "**subject to each of the following provisions"**:

Yes, only what is selected for transfer is subjected to the laundry list. If only the accounts are transferred i.e. (traffic only transfer), then only those accounts transferred are subjected to their account obligations. If the plan was transferring then the plan would be subjected to the plan obligations listed. Additionally, see in 2.1.8 para B: "These obligations include, **for example"** What is being implied here is that these are just "examples" of what obligations may be transferred depending upon what has been agreed upon within the "ANY" amount of accounts or plan agreed upon by Former and New Customer

for transfer. ANY could be one, some or most accounts; whatever is specified by the transferor and transferee. **This is the way it works!!!**

161) The May 1996 version of 2.1.8 proves petitioner's 1995 tariff analysis of 2.1.8 is correct. The same tariff analysis hold true for Jan 1995. To further support petitioner's 2.1.8 tariff analysis in 1995 is the fact that even though plan commitments were not listed within 2.1.8 in **Jan 1995** petitioners still did plan transfers. It was understood that when you did a plan transfer the plans obligations were transferred even though no plan obligations were listed after the phrase: (these obligations include).

162) So plan commitments were "in theory" there but did not come into play because a traffic only transfer was done and not a plan transfer. Likewise, adding additional obligations to the list in subsequent 2.1.8 versions (like Nov. 1995 exhibit P in initial filing and May 1996) still didn't change the fact that on"traffic only" transfers the transferors' plan obligations (revenue commitments and the potential for shortfall and termination) did not transfer; never did and still do not today!

163) According to AT&T's bogus theory CCI's revenue commitments/S&T obligations **must** transfer to PSE on a traffic only transfer. See the 2.1.8 version which became effective 02/23/02 at exhibit J in petitioner's initial filing)

> The AT&T Transfer of Service Agreement "**may" require** the new Customer to **assume all of the current customer's obligations** and the current customer to remain jointly and severally liable for any obligations relating to the pre transfer period.

164) AT&T didn't change section 2.1.8 to go from must transfer in 1995 to may transfer in 2002. If anything the requirements under AT&T Transfer of Service were substantially increased as time went on not decreased. The list of obligations after the phrase: "These obligations include" is **totally meaningless.** Whether the obligations are listed or not they pertain only to what (traffic or plan) is transferred. The bottom line if an AT&T customer does a traffic only transfer than all account obligations must be transferred. If a plan is transferred then additionally all the Customer plan obligations transfer also transfer.

XIV What CCI –PSE Wanted to Do Was Permitted Under The Tariff

165) AT&T questions the CCI –PSE contract. Page 23 -24 the 7th line from bottom on pg. 23:

> In one passage, the Commission summarizes "a letter agreement between CCI and PSE" that explains how these two entities intended to structure the transfer. See Commission 2003 Decision, 19 n.51 (quoted in the Petn. at 15). This summary simply describes what CCI and PSE wanted to do, not what they were legally permitted to do under the tariff. Moreover, the two features of the proposed transfer that petitioners quote from this summary-that CCI would remain responsible for its commitments under the plan and that PSE would assist in moving accounts to enable CCI to meet those commitments-**say nothing whatever about the commitments, or obligations, that PSE had to assume.**

As usual AT&T is wrong. The record clearly shows what CCI/Inga transferred and what PSE assumed. Both parties understood that the minimum payment period and the indebtedness would go to the PSE. The PSE RVPP pool would be

debited as per 3.3.1.Q bullet 6 & 8. PSE's cover PSE's bad debt as the non vacated Politan Decision noted and the FCC agreed.

166) The cover letter from PSE which is exhibit F to petitioner's initial filing explained that it was a "proper" transaction. Also exhibit F to petitioner's initial filing shows PSE's manager Pat Bello explaining that it had to secure the account obligations. AT&T which is desperate for a defense now attempts 12 years too late to bogus defenses that are simply not there.

XV. AT&T Failed the 15 day Statute of Limitations Evaluation Period Within Section 2.1.8

167) AT&T asserts on page 35 para 1:

> Accordingly, AT&T remained entitled to refuse to process petitioners' proposed transfer because it did not satisfy § 2.1.8's second condition.
>
> By its plain terms, this provision placed a limited third condition on the rights of resellers to transfer service. It manifestly did not condition AT&T's right to refuse to process transfers that failed to comply with § 2.1.8's other requirements.

168) AT&T is again misleading the FCC. The 15 days is not a provisioning time period it is an evaluation period.

Consider the District Court's May 1995 non vacated Decision page 7 para 1. This was page 62 of the Joint Appendix to the DC Circuit Court:

> Neither the Inga companies nor CCI received **any written notice of non-acceptance** by AT&T of their TSA's within **fifteen days** of December 16, 1994, the date of the original submission of the TSA's.

169) Consider the District Court's May 1995 non vacated Decision page 20 para 1. This was page 75 of the Joint Appendix to the DC Circuit Court:

> The parties properly executed the TSA's and **did not receive any notification of disapproval within the tariff-mandated fifteen day period**, and came to believe **– justifiably** – that the transfer had been **approved** and that CCI was the new customer of record on the plans.

It is clear from the non vacated District Court decision which AT&T did not even appeal that the 15 days period under 2.1.8 is a transaction evaluation period not a provisioning period.

170) In fact AT&T in May of 1996 filed another version of section 2.1.8 and it explained in detail that it was an evaluation period. **See PETITIONER EXHIBIT C ON PAGE 164**

> **D.** The Current Customer will no longer be AT&T's Customer for the service as of the Effective Date of the transfer, which will be the **earlier** of the date on which AT&T provides to the New Customer a written **acceptance** of the transfer or assignment, or the **fifteenth day** after AT&T receives a fully executed original of the Transfer of Service form, except:
>
> 1. The transfer will not be effective if, "**within fifteen days"** after AT&T receives a fully executed original of the Transfer of Service form, **AT&T provides to the New Customer a written rejection** of the requested transfer. AT&T may not unreasonably reject a transfer or assignment of service. AT&T may, for example, reject a transfer or assignment of service if the Current Customer or New Customer fails to supply the executed original(s) of the Transfer of Service form, fails to adequately identify the Current Customer or the service being transferred, asks that the transfer or assignment be made subject to conditions, or fails to furnish a deposit required in connection with the intended transfer pursuant to Section 2.5.8, following. **AT&T will provide a written statement of its reason(s) for rejecting a transfer or assignment of service.**

171) Under AT&T's definition it can indefinitely deny a transaction and force customers to have to bring claims against AT&T for failure to process the transaction, and then subjectively judge each transaction. No one is denying AT&T the right to evaluate each transaction but it must first notify the parties

that it is temporarily denying service. Here AT&T did not do so. All commercial activity (buy sell agreements, division sell offs, seller buy backs, mergers and acquisitions etc) all could be held up while AT&T waits indefinitely to process the orders.

172) The 15 days did not require AT&T to evaluate the entire transaction within 15 days. All AT&T had to do was simply notify parties that it was holding the transaction for evaluation, and explain what its concerns were and allow the parties to clarify, but AT&T did not even do that.

According to AT&T it should have the capacity to simply not process substantial transfers and then claim that it is its subjective belief that there was fraud going on. The FCC FOIA notes clearly state that AT&T should not be allowed to subjectively determine intent. Here the commitments were met and the plans, as AT&T now concedes, were grandfathered. There simply was no justification not to process the transfer.

173) Statute of limitations goes both ways. How many aggregators are out there have valid claims that have been stopped due to statute of limitations? AT&T can not have it both ways.

What about all the issues that go into deciding the case. AT&T raised issues of fraud, interpreting notations on TSA's; changing its belief where S&T are located (within minimum payments or within the term all obligations); changing positions regarding whether or not the transferors plan has joint and several

liability on a traffic only transfer; whether PSE supposedly assumed one obligation or no obligations or just two obligations.

174) The "Discovery of Harm" Rule:

All these so called issues are present at the time of transfer. AT&T wishes to toll the statue of limitations indefinitely. The tolling of the Statute of Limitations may occur when dealing with minors; or a person not realizing it was harmed, such as in a medical case where the gestation of the claim manifests itself after the Statute of Limitations. However, in the case at hand all the things that AT&T raises were easily identifiable at the time of transfer. The 15 days therefore must from the time that AT&T knew (or should reasonably have known) that it believed it had suffered harm, and the nature of that harm. AT&T didn't raise any issues within the 15 days. **Only those issues raised by AT&T within the 15 day period should be open for review**. Since AT&T was silent on all issues, the 15 day Statute of Limitations prohibits AT&T from raising any issues.

175) If AT&T raised the issue that it wanted S&T obligations to transfer within the 15 days then that would be a justifiable tolling of the transaction, but AT&T did not.

If AT&T raised an issue that it wanted S&T obligations to transfer within the 15 days because that is what it believed how its tariff should be interpreted but did not raise other reasonably discoverable issues then none of the other issues are tolled. Here is the

> **Transfer or Assignment** – WATS, including **ANY** associated telephone **number**(s), may be **transferred or assigned** to a new Customer, provided that:
>
> C. The Company acknowledges the **transfer or assignment** in writing. The acknowledgement will be made within 15 days of receipt of notification.

176) The 15 days speaks to the submission of the 2.1.8 TSA contract and all that is included within the 2.1.8 TSA contract. It is not a provisioning period statement. Provisioning times are not tariffed items. AT&T has ordering times in its tariffs but this 15 days as per AT&T's agreement with the non vacated District Court Decision was an evaluation time that AT&T did not adhere to.

177) **AT&T was giving itself 15 days to evaluate the transfer not process the transfer.** If it was a processing time declaration it would say: The transaction will be processed within 15 days.

AT&T's tariff did not say that this 15 day period is the time AT&T has to process the order if AT&T determines that it is in compliance with the tariff.

178) The FCC is well aware that AT&T's briefs rambled on to the DC Circuit how 2.1.8 was the way to provision accounts due to how easy it was to bulk transfer with no signatures and no installation etc. The whole point AT&T was making was that provisioning was a snap. Hit a computer button and the accounts transfer from one AT&T customer to another. The DC Circuit was impressed with AT&T's 2.1.8 provisioning simplicity argument as it even stated on pgs. 9-10 exhibit C to petitioner's initial filing:

> AT&T argues that the transfer provision, Section 2.1.8, was indeed precisely because there are practical benefits to a transfer that would be lost through a transaction of the sort hypothesized by the Commission. These include **guarantees against service interruptions** and the loss of particular 800 numbers, as well as the exemption from a requirement that resellers obtain their end-users' written consent prior to the transaction. See AT&T Br. At 21-23.

179) AT&T's was asserting how easy it was to move end-users who all were on AT&T's underlying network. It was as easy as hitting a button and instantaneously changing the aggregator ID from CCI to PSE. The 15 day period could not have possibly meant that AT&T needed 15 days to provision end-users. It was a 5 minute process according to AT&T's Joyce Suek. The 15 days was obviously a transfer evaluation period.

Further evidence of this point can be seen when subsequent versions of 2.1.8 increased the evaluation period from 15 days to 30 days. It is an would be absurdity to believe that AT&T needed 15 days to do a paperwork transfer; let alone 30 days.

180) AT&T is responsible in knowing its tariff. All AT&T would have had to do is indicate the issues within 15 days then those issues would have been tolled; but AT&T did nothing as far as notify customers. What AT&T did do is run to the FCC without customers knowledge and try to convince the FCC that it could retroactively change its tariff. AT&T should have notified customers not the FCC. Thus the 15 days speaks to the totality of the transaction ordered.

AT&T counsel Fred Whitmere sent a letter to petitioner's dated February 6th 1995 (Exhibit X in plaintiffs initial Sept 27th filing) questioning for the **first time**

plaintiffs traffic only transfer transaction. Mr. Whitmer was advised that there was no hanky panky going on. Still AT&T denied the traffic only transfer. Now look at exhibit F in petitioner's initial filing and see the traffic transfer requests (TSA's and cover letter) were latest dated Jan 13th 1995. AT&T has never disagreed that it received the traffic transfer request on time.

181) The FCC has the clear undisputed fact that AT&T was in violation of 2.1.8's 15 day statute of limitations. Once it was determined that 2.1.8 allowed traffic only transfers as petitioners did, all additional AT&T claims are barred by 2.1.8's 15 day statute of limitations. The FCC would stand law upside down not to adhere to clear statute of limitations law. If the FCC were to disregard statute of limitations law it would subject itself to the opening of cases after its own 2 year statute of limitations, and render statute of limitations totally meaningless.

Any ambiguity in the tariff must be construed against the carrier and the 15 days statute of limitations must be enforced.

XVI Declaratory Rulings Requested Recap Petitioners Respectfully Request that the FCC Issue Declaratory Rulings on the Initial Issues Requested

1) By not transferring the traffic specified in Jan. 1995 under section 2.1.8.

2) Due to section 2.1.8 not having explicit provisions.

3-A) By violating 201(b) for its unjust and unreasonable interpretation of its discontinuation

(restructure) provision on pre 6/17/94 plans, asserting the pre become post 6/17/94 when restructured prior to the 1st yr of a 3 yr. term. **3-B)** And/Or for violation of 203 that indicates the CSTPII plan is at least grandfathered for three years after the June 17th 1994 substantive change.

4) By not adhering to the 15 day statute of limitations requirement of 2.1.8. Once 2.1.8 was determined as allowing traffic only or plan transfers the question of which obligations is moot.

5) By not adhering to section 3.3.1.Q bullet 10 by using an illegal remedy: A) Initially applying the charges to the end-users instead of its customer the aggregator and B) inflicting shortfall charges upon end-user locations in excess of the end-users discounts.

6) The FCC should declare that S&T obligations should have been waived under 2.5.7. (Circumstance Beyond Customers Control) because of AT&T's interpretation that a discontinuance (restructure) was simultaneously both a new plan and not a new plan.

7) By engaging in discrimination under 202 of the Act by not providing petitioners' with a contract tariff despite qualifying for it and also refusing all 90 day public offerings.

8) As noted by the District Court by engaging in discrimination under 202 of the Act for allowing thousands of other AT&T customers to transfer traffic only, both prior to and well after the Jan 1995 denied traffic transfer, but not allowing petitioners.

9) By violating 201(b) for unjust and unreasonable use of its fraudulent use provisions when the record indicates that the fiscal year commitments were met, and the traffic could be taken back.

10) Discrimination- On same transaction taking the position with co-petitioner (CCI) that the S&T charges were **bogus** and therefore needing to pay CCI, while asserting petitioners S&T charges were **legit.**

11) The FCC should again declare that AT&T used an illegal fraudulent use remedy by permanently denying the traffic only transfer instead of temporarily suspending service and therefore AT&T can not rely upon such charges even if the were found legitimate.

12) All the Declaratory Rulings as submitted by the petitioner's must be determined by the FCC.

Respectfully submitted this date by Larry G Shipp Jr., and Combined Companies, Inc.

By__//Signed//_____
Larry G Shipp